DOCKET

No. 13-935

Title:	Wellness International Network, Limited, et al., Petitioners v. Richard Sharif
Docketed:	February 5, 2014
Linked with 13A648	
Lower Ct:	United States Court of Appeals for the Seventh Circuit
Case Nos.:	(12-1349)
Decision Date:	August 21, 2013
Rehearing Denied:	October 7, 2013

Questions Presented

---Date---	------Proceedings and Orders----------
Dec 20 2013	Application (13A648) to extend the time to file a petition for a writ of certiorari from January 5, 2014 to February 5, 2014, submitted to Justice Kagan.
Dec 20 2013	Application (13A648) granted by Justice Kagan extending the time to file until February 5, 2014.
Feb 5 2014	Petition for a writ of certiorari filed. (Response due March 7, 2014)
Mar 7 2014	Brief of respondent Richard Sharif in opposition filed.
Mar 21 2014	Reply of petitioners Wellness International Network, Limited, et al. filed.
Mar 26 2014	DISTRIBUTED for Conference of April 18, 2014.
Jun 9 2014	DISTRIBUTED for Conference of June 12, 2014.
Jun 16 2014	DISTRIBUTED for Conference of June 19, 2014.
Jun 23 2014	DISTRIBUTED for Conference of June 26, 2014.
Jun 30 2014	DISTRIBUTED for Conference of June 30, 2014.
Jul 1 2014	Petition GRANTED limited to Questions 1 and 3 presented by the petition.
Jul 14 2014	The time to file the joint appendix and petitioners' brief on the merits is extended to and including September 9, 2014.
Jul 14 2014	The time to file respondent's brief on the merits is extended to and including November 19, 2014.
Sep 9 2014	Joint appendix filed. (Statement of costs filed.)
Sep 9 2014	Brief of petitioners Wellness International Network, Limited, et al. filed.
Sep 9 2014	Consent to the filing of amicus curiae briefs in support of either party or neither party from counsel for the respondent.
Sep 11 2014	Brief amicus curiae of the United States filed.
Sep 16 2014	Brief amicus curiae of American College of Bankruptcy filed.

Sep 16 2014	Brief amicus curiae of Business Law Section of the Florida Bar in support of neither party filed.
Sep 16 2014	Brief amicus curiae of National Association of Bankruptcy Trustees filed.
Sep 16 2014	Brief amicus curiae of G. Eric Brunstad, Jr. filed.
Sep 16 2014	Brief amicus curiae of American Bar Association filed.
Nov 7 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 19 2014	Brief of respondent Richard Sharif filed.
Nov 19 2014	Supplemental appendix of respondent filed.
Nov 21 2014	SET FOR ARGUMENT ON Wednesday, January 14, 2015.
Nov 26 2014	Brief amici curiae of Certain TOUSA Defendants filed.
Dec 2 2014	CIRCULATED.
Dec 2 2014	Record requested from U.S.C.A. 7th Circuit.
Dec 8 2014	Record received from U.S.C.A. is electronic and located on PACER.
Dec 8 2014	Record received from U.S.D.C. Northern District of Illinois, Eastern Division is electronic.
Dec 15 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 19 2014	Reply of petitioners Wellness International Network, Limited, et al. filed. (Distributed)
Jan 14 2015	Argued. For petitioners: Catherine Steege, Chicago, Ill.; and Curtis E. Gannon, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Jonathan D. Hacker, Washington, D.C.
May 26 2015	Judgment REVERSED and case REMANDED. Sotomayor, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, and Kagan, JJ., joined, and in which Alito, J., joined in part. Alito, J., filed an opinion concurring in part and concurring in the judgment. Roberts, C. J., filed a dissenting opinion, in which Scalia, J., joined, and in which Thomas, J., joined as to Part I. Thomas, J., filed a dissenting opinion.

PETITION FOR WRIT OF CERTIORARI

13-935

No. _____

IN THE

Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LIMITED, RALPH OATS, AND CATHY OATS,

Petitioners,

v.

RICHARD SHARIF,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 5, 2014

QUESTIONS PRESENTED

In *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011), the Court held that "in one isolated respect" Congress exceeded the limitations of Article III of the Constitution when it established the current framework under which bankruptcy courts decide matters. *Stern* framed the operative constitutional question as "whether the action at issue stems from the bankruptcy itself," and concluded that because the debtor Stern's state-law-based counterclaim against a creditor, Marshall, was "in no way derived from or dependent upon bankruptcy law" and would "exist[] without regard to any bankruptcy proceeding" the bankruptcy court could not constitutionally enter a final order in that action. *Id.* at 2618.

Since *Stern*, the lower courts have demonstrated considerable confusion in determining when an action "stems from the bankruptcy itself." Here, the United States Court of Appeals for the Seventh Circuit held that bankruptcy courts lack the constitutional authority to decide, in an action against the debtor, whether property in the debtor's possession is property of the bankruptcy estate under 11 U.S.C. § 541 because that determination also required the resolution of state-law issues. Pet. App. 45a-51a. The Seventh Circuit also held that Article III did not permit a bankruptcy court to exercise the judicial power of the United States to determine an action against a debtor who had consented to the exercise of that power by voluntarily

filing his petition in bankruptcy court. *Id.* at 31a-45a. The Seventh Circuit's decision reflects, and exacerbates, the considerable confusion in the lower courts over when "the action at issue stems from the bankruptcy itself" and whether a debtor, after filing his petition in the bankruptcy court, may then object to the bankruptcy court's rulings against him on Article III grounds. As a practical matter, the Seventh Circuit's decision represents a crippling reduction of the bankruptcy courts' authority both because property of the estate determinations are often the most fundamental issues in a bankruptcy case and because state-law issues permeate all aspects of bankruptcy cases. The questions presented therefore are:

1. Whether the presence of a subsidiary state property law issue in a 11 U.S.C. § 541 action brought against a debtor to determine whether property in the debtor's possession is property of the bankruptcy estate means that such action does not "stem[] from the bankruptcy itself" and therefore, that a bankruptcy court does not have the constitutional authority to enter a final order deciding that action.

2. Whether Article III permits the bankruptcy courts to exercise the judicial power of the United States over claims against a debtor where the debtor has consented to the exercise of such judicial power by voluntarily filing for bankruptcy relief.

In addition, this case also presents the two questions currently before the Court in *Executive Benefits Insurance Agency v. Arkison*, 133 S. Ct. 2880 (2013) (No. 12-1200). Because of the procedural posture of *Executive Benefits*—there the district court reviewed the bankruptcy court's summary judgment order *de novo*—it is possible that the Court may conclude that no constitutional violation occurred and thus, not reach the issues on which *certiorari* was granted. In such event, this case presents the opportunity to address those questions, about which there is also a split among the circuits:

3. Whether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant's conduct is sufficient to satisfy Article III.

4. Whether bankruptcy courts have the statutory authority to submit proposed findings of fact and conclusions of law for *de novo* review by a district court in a "core" proceeding under 28 U.S.C. § 157(b).

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

Petitioner Wellness International Network, Limited, is a subsidiary of WIN Network, Inc. No publicly-held entity owns ten percent or more of the stock of Wellness International Network, Limited.

The petitioners are Wellness International Network, Limited, Ralph Oats, and Cathy Oats, the plaintiffs and appellees below.

The respondent is Richard Sharif, the defendant and appellant below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Wellness International Network, Limited, Ralph Oats, and Cathy Oats (collectively "Wellness") respectfully submit this petition for a writ of certiorari to review a decision of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 727 F.3d 751. The district court's opinion (Pet. App. 69a-91a) is unreported. The bankruptcy court's opinion (Pet. App. 92a-120a) is unreported.

JURISDICTION

The court of appeals entered its judgment on August 21, 2013. On September 5, 2013, the court of appeals granted an extension of time in which to file a petition for rehearing or rehearing *en banc* to September 18, 2013. On September 18, 2013, Wellness timely filed its Petition for Rehearing and Rehearing *En Banc*. On October 7, 2013, the court of appeals denied the Petition for Rehearing. Pet. App. 67a-68a. On December 20, 2013, Justice Kagan granted an extension of time in which to file a petition for a writ of certiorari to February 5, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

28 U.S.C. § 2403(a) applies in this case. The notification required by Supreme Court Rule 29.4(b)

has been made to the Solicitor General of the United States. The court of appeals did not make a certification to the Attorney General pursuant to 28 U.S.C. § 2403(a).[1]

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, § 1 of the Constitution provides:

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

U.S. CONST. art III, § 1.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 157 is reproduced in full in an appendix hereto. Pet. App. 121a-124a.

STATEMENT OF THE CASE

In a situation where a non-debtor litigant had *not* consented to be sued in bankruptcy court, *Stern*

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[1] This may be due to the fact that Respondent first raised a constitutional issue in his reply brief in the court of appeals. Pet. App. 17a.

held, as did a plurality of the Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), that Article III of the Constitution precluded the bankruptcy court from entering a final judgment on a state-law claim that did not "stem[] from the bankruptcy itself" and which would not "necessarily be resolved in the claims allowance process." 131 S. Ct. at 2618. *Stern* left open the question of exactly what matters would "stem[] from the bankruptcy itself." *Id.* Nevertheless, the Court's statement that its decision did "not change all that much," *id.* at 2620, strongly suggested that the Court would continue to hold that bankruptcy courts have the constitutional authority to hear and determine those matters that historically have been the "[c]ritical features of every bankruptcy"—"the exercise of exclusive jurisdiction over all of the debtor's property." *Central Va. Cmty. College v. Katz*, 546 U.S. 356, 363-64 (2006).

The lower courts have not uniformly followed the Court's suggestion that its holding in *Stern* is narrow. Litigation over the breadth of *Stern* has extended to virtually every type of action and contested matter that arises in a bankruptcy case and this case is a prime example of the great uncertainty that currently exists over the reach of *Stern*. *See, e.g.*, Jonathan C. Lipson, *Stern, Seriously: The Article I Judicial Power, Fraudulent Transfers, and Leveraged Buyouts*, Wis. L. Rev. 1161, 1187-94 (2013) (explaining the ambiguity created in *Stern* over whether bankruptcy courts may decide issues of state law); Tyson A. Crist, *Stern*

v. Marshall: Application of the Supreme Court's Landmark Decision in the Lower Courts, 86 Am. Bankr. L.J. 627, 629 (2012) ("*Stern* has once again left the bankruptcy world in an unsettled state with many new questions, but few clear answers").

The Seventh Circuit's conclusion that bankruptcy courts can no longer decide disputes with a debtor over whether his property belongs to the bankruptcy estate if the dispute involves state property law issues represents a crippling blow to the ability of bankruptcy courts to adjudicate bankruptcy cases. Instead of not "chang[ing] all that much," 131 S. Ct. at 2620, the Seventh Circuit's reading of *Stern* will change almost everything because state-law issues underlie virtually all aspects of bankruptcy cases.

This case also presents the question of whether a litigant can consent to a non-Article III adjudication in a different posture from that of *Stern* and the case currently before the Court, *Executive Benefits Insurance Agency v. Arkison*, 133 S. Ct. 2880 (2013) (No. 12-1200). In both *Executive Benefits* and *Stern*, the litigants challenging the constitutional authority of the bankruptcy courts were third parties that had been sued by the bankruptcy estate. In this case, the party challenging the constitutional authority of the bankruptcy court is the debtor who voluntarily chose to file his bankruptcy petition in the bankruptcy court and then only objected to the bankruptcy court's ruling after he lost. Thus, this case presents the question of consent in the context of a litigant

who affirmatively selected the bankruptcy court as the forum in which to proceed. This case, therefore, presents an opportunity to clarify the extent of the bankruptcy court's constitutional authority in actions against a debtor. Moreover, to the extent that the Court does not reach the merits of either of the two questions presented in *Executive Benefits*, this case presents an opportunity to address those questions as well.

A. The Bankruptcy Court's Entry Of Final Judgment Against Sharif.

Richard Sharif ("Sharif") filed suit against Wellness in federal district court in Texas. He lost his case after he ignored Wellness's discovery requests, resulting in the material facts of the case being deemed admitted against him. The Fifth Circuit affirmed the judgment against Sharif, calling his suit against Wellness "feckless" and remanding so that the district court could consider an award of attorney's fees. Pet. App. 5a. On remand, the district court in Texas entered judgment for $655,596.13 in favor of Wellness and against Sharif. Pet. App. 6a.

Following entry of the judgment, Wellness commenced a collection action in the district court in Texas. Pet. App. 6a. On the heels of a civil contempt order for failing to respond to post-judgment discovery about his assets, Sharif filed a chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Northern District of Illinois. *Id.*

Once in bankruptcy, Sharif again failed to produce documents about his assets to his bankruptcy trustee. Pet. App. 7a-8a. Based on a personal financial statement Wellness obtained showing that Sharif had more assets than he listed on his bankruptcy schedules, Wellness filed suit against Sharif in the bankruptcy court pursuant to 11 U.S.C. § 727 seeking to block Sharif's discharge. Pet. App. 8a. As part of that complaint, Wellness also sought a declaratory judgment that assets Sharif purportedly held in trust—the same assets appearing on Sharif's personal financial statement—actually were property of Sharif's bankruptcy estate. *Id.*

Sharif again failed to respond properly to Wellness's discovery requests or to the bankruptcy court's discovery orders. Pet. App. 8a-9a. Wellness moved for sanctions, asking the bankruptcy court, among things, to enter a default judgment against Sharif. Pet. App. 9a. Sharif responded with a motion for summary judgment, asking the bankruptcy court to enter final judgment in his favor on all counts of the complaint. Pet. App. 10a. On July 6, 2010, the bankruptcy court denied Sharif's summary judgment motion, entered a default judgment against Sharif in which the bankruptcy court denied Sharif his discharge and found that the assets purportedly held by Sharif in the so-called Soad Wattar Trust were property of Sharif's bankruptcy estate. Pet. App. 10a-14a.

B. Appellate Proceedings In The District Court And The Court Of Appeals.

Sharif appealed to the United States District Court for the Northern District of Illinois. Pet. App. 14a. Sharif filed his opening appeal brief six weeks after the Court had decided *Stern*, but did not challenge the constitutional authority of the bankruptcy court to enter final judgment. Pet. App. 15a. Instead, after briefing on the appeal was complete, Sharif moved for leave to file a supplemental brief so that he could raise a constitutional challenge based on *Stern*. Pet. App. 15a. The district court denied Sharif's motion as untimely and affirmed the bankruptcy court's judgment. Pet. App. 15a-17a.

Sharif then appealed to the Seventh Circuit. Pet. App. 17a. Once again, Sharif failed to object to the bankruptcy court's constitutional authority to enter a final judgment and did not cite *Stern*. Pet. App. 17a. As a result, Wellness did not address *Stern* in its response brief. No. 12-1349, Dkt. 14 (7th Cir.). Sharif first cited *Stern* in his reply, arguing that the bankruptcy court lacked jurisdiction to declare what assets were property of Sharif's bankruptcy estate. Pet. App. 17a. Sharif did not contest the constitutional authority of the bankruptcy court to decide the discharge claim. *Id.* Sharif also did not file a FED. R. APP. P. 44(a) notice that he was raising a constitutional issue and the United States was not otherwise notified that the court of appeals would be addressing a constitutional question.

The Seventh Circuit issued its decision on August 21, 2013. Pet. App. 1a. It affirmed the judgment denying Sharif a discharge, holding that Wellness's objections to Sharif's discharge "stem from federal law, not state law, as the provisions of 11 U.S.C. § 727 provide the relevant rules of decision" and the decision "to grant or deny discharge is central to the restructuring the debtor-creditor relationship." Pet. App. 45a-46a.

The Seventh Circuit reached the opposite result on the property of the estate claim, holding that the bankruptcy court lacked the constitutional authority to decide whether property in the debtor's possession was property of the debtor's bankruptcy estate. Pet. App. 46a-51a. The court of appeals reached this result even though it also acknowledged that this Court "has not come close to holding that an Article III judge must decide claims for which the Bankruptcy Code itself provides the rule of decision." Pet. App. 46a. Focusing on the fact that property of the estate determinations under § 541 of the Bankruptcy Code also involve questions of state law, the court of appeals concluded that Wellness's request for a declaration that the supposed trust assets were estate property is a "state-law claim between private parties that is wholly independent of federal bankruptcy law and is not resolved in the claims-allowance process" and therefore "is indistinguishable from the tortious-interference counterclaim in *Stern*." Pet. App. 48a, 51a.

The court of appeals also held that Sharif could not waive his constitutional objection based on *Stern* because such objections "implicate[] separation-of-powers principles" and are not waivable. Pet. App. 3a. In doing so, the court of appeals noted that the issue of waiver "is a thorny question", acknowledging that the circuits are split on this issue. Pet. App. 18a.

Finally, the court of appeals addressed what authority a bankruptcy court had over matters classified as "core" under 28 U.S.C. § 157(b)(2) but that are outside of the bankruptcy court's constitutional authority to decide. Pet. App. 51a-54a. Again recognizing that its decision created a split in the circuits, the court of appeals held that bankruptcy courts have no authority to do anything, including presiding over pre-trial discovery, in matters that are denominated as core under § 157(b)(2), but where the bankruptcy courts may not constitutionally enter a judgment order. Pet. App. 51a-54a.

The effect of the Seventh Circuit's decision is that bankruptcy courts in that Circuit have no authority to preside over or determine disputes with the debtor about whether property in a debtor's possession is property of the bankruptcy estate under 11 U.S.C. § 541. The decision also holds that bankruptcy courts have no authority to decide state-law issues even where the state-law issue arises in the context of an action that is based on the Bankruptcy Code.

REASONS FOR GRANTING THE PETITION

This petition presents three fundamental questions about the constitutional and statutory limits on the authority of non-Article III bankruptcy judges.

First, this case presents the Court with an opportunity to clarify the scope of the exception established in *Stern*: when does an "action stem[] from the bankruptcy itself." 131 S. Ct. at 2618. *Stern* suggested that an action would "stem[] from the bankruptcy itself" if the action was derived from or dependent on bankruptcy law and would exist only in the context of a bankruptcy case. *Id.* The action at issue here would, on its face, appear to meet both requirements—it was brought against the debtor under § 541 of the Bankruptcy Code to determine whether property in the debtor's possession belonged to the bankruptcy estate, a determination that only has relevance in the context of a bankruptcy case. Indeed, historically bankruptcy courts (and their historical precursors) have always decided such issues. *Mueller v. Nugent*, 184 U.S. 1, 13-14 (1902); Thomas E. Plank, *Why Bankruptcy Judges Need Not And Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 584-87, 600-10 (1998).

Nonetheless, the Seventh Circuit, in a radical departure from historical precedent that will undermine the efficacy of the bankruptcy process, concluded that the action under § 541 was a state-

law claim that did not "stem[] from the bankruptcy" and the bankruptcy court, therefore, lacked constitutional authority to decide the dispute. That holding directly conflicts with a decision of the Fourth Circuit. *Canal Corp. v. Finnman (In re Johnson)*, 960 F.2d 396 (4th Cir. 1992). *Johnson* held that bankruptcy courts continued to have the authority to enter final orders in actions against a debtor to determine whether property in the debtor's possession belonged to the bankruptcy estate following this Court's decision in *Northern Pipeline*, 458 U.S. at 50. *See Johnson*, 960 F.2d at 400-02. The Seventh Circuit differed from the Fourth Circuit because the Seventh Circuit characterized the § 541 claim as a state-law claim and concluded that the presence of a state-law issue took the claim outside of the bankruptcy court's constitutional authority to decide.

The Seventh Circuit's conclusion that a § 541 claim is a state-law claim also conflicts with the decisions of six circuits, all of which hold that actions under § 541 are federal law claims even though these actions almost always involve issues of state-law. *See Croft v. AMS SAManagement LLC (In re Croft)*, 737 F.3d 372, 374 (5th Cir. 2013); *Tyler v. DH Capital Mgmt., Inc.*, 736 F.3d 455, 461 (6th Cir. 2013); *Parks v. Dittmar (In re Dittmar)*, 618 F.3d 1199, 1204 (10th Cir. 2010); *Redmond v. Lentz & Clark, P.A. (In re Wagers)*, 514 F.3d 1021, 1028 (10th Cir. 2007); *Abboud v. The Ground Round, Inc. (In re The Ground Round, Inc.)* 482 F.3d 15, 17 (1st Cir. 2007); *Am. Bankers Ins. Co. of Fla. v. Maness*, 101

F.3d 358, 362-63 (4th Cir. 1996); *N.S. Garrott & Sons v. Union Planters Nat'l Bank of Memphis (In re N.S. Garrott & Sons)*, 772 F.2d 462, 466 (8th Cir. 1985). The Seventh Circuit's conclusion that bankruptcy courts lack the constitutional authority to decide even Bankruptcy Code-based claims if they involve state-law issues threatens to shift much of the traditional work of bankruptcy courts to the district courts as state-law issues permeate many, if not most, aspects of bankruptcy cases. *See Stern*, 131 S. Ct. at 2616.

Second, this case also presents the Court with the question of whether Article III is violated when a bankruptcy court enters a final order against a debtor. In *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 847-50 (1986), the Court concluded that Article III was not violated when the litigant who advanced the Article III objection had voluntarily filed suit in a non-Article III forum. That is exactly what the debtor Sharif did here, voluntarily choosing to file bankruptcy knowing that he was subjecting his person and property to the authority of the bankruptcy court. Consistent with *Schor*, in the analogous context of whether a debtor waives his Seventh Amendment right to trial by jury by voluntarily filing a bankruptcy petition, *see Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 53 (1989), the Sixth Circuit has held that a debtor consents to proceed without a jury, and waives his Seventh Amendment right to a jury, by filing a bankruptcy petition. *See Longo v. McLaren (In re McLaren)*, 3 F.3d 958 (6th Cir. 1993). By holding

that the debtor could not consent to proceed in bankruptcy court on questions about whether his property belonged to the bankruptcy estate, the Seventh Circuit's decision created a split with the Sixth Circuit, and reached a result that is inconsistent with *Schor*. In addition, this case also presents a variation of the consent question before the Court in *Executive Benefits*, 133 S. Ct. 2880 (No. 12-1200), whether a litigant can consent by his litigation conduct to a decision by a non-Article III court.

Finally, the Seventh Circuit's decision also presents the same question currently before the Court in *Executive Benefits*, 133 S. Ct. 2880 (No. 12-1200): whether a bankruptcy court has the statutory authority to recommend proposed findings of fact and conclusions of law in a matter that while previously denominated as core as 28 U.S.C. § 157(b)(2) is held to be outside of the bankruptcy court's constitutional authority to decide. If the Court does not address that question in *Executive Benefits*, this case presents an opportunity for the Court to do so.

I. The Court Should Resolve The Question Of Whether An Action Against The Debtor Based On 11 U.S.C. § 541 Is A Federal Law Action "That Stems From The Bankruptcy Itself" Such That a Bankruptcy Court May Enter A Judgment Order.

A. The Seventh Circuit's Holding Directly Conflicts With A Decision Of The Fourth Circuit.

Stern held that bankruptcy courts "lack[] the constitutional authority to enter a final judgment on a state-law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." 131 S. Ct. at 2620. In striking 28 U.S.C. § 157(b)(2)(C) as unconstitutional, the Court emphasized that it was not invalidating the authority of bankruptcy courts to enter final judgments in all circumstances; instead, the Court suggested that bankruptcy courts could continue to decide by final order those actions that "stem[] from the bankruptcy itself or would necessarily be resolved in the claims allowance process." 131 S. Ct. at 2618. As the Court explained, because the state-law action against the creditor that was at issue in *Stern* "is in no way derived from or dependent upon bankruptcy law" and would "exist[] without regard to any bankruptcy proceeding," it was outside of the constitutional bounds of the bankruptcy court's authority to enter a final judgment. *Id.*

The Seventh Circuit's decision that, as a result of *Stern*, bankruptcy courts may no longer enter final orders in actions against a debtor seeking to determine whether property in the debtor's possession is property of the estate conflicts squarely with a decision of the Fourth Circuit holding that bankruptcy courts may enter final orders in such matters. *Canal Corp. v. Finnman (In re Johnson)*, 960 F.2d 396, 400-02 (4th Cir. 1992). In *Johnson*, the debtor operated a pyramid scheme. The defrauded investors brought suit in bankruptcy court against the bankruptcy estate, seeking a declaration that certain funds were not property of the estate, but instead were subject to a constructive trust. The bankruptcy court agreed, entering a final order declaring that the funds did not belong to the estate and directing the bankruptcy trustee to distribute them to some, but not all, of the investors. The investors who did not receive a distribution objected and their objections were denied by a final order. *Id.* at 398-99.

On appeal, the Fourth Circuit addressed the authority of the bankruptcy court to enter a final order in light of this Court's decision in *Northern Pipeline*. *Johnson*, 960 F.2d at 400-02. *Northern Pipeline*, like *Stern*, holds that bankruptcy courts lack the constitutional authority to enter final orders on state-law claims against non-debtor parties. *Compare Northern Pipeline*, 458 U.S. at 69-72 *with Stern*, 131 S. Ct. at 2615. The Fourth Circuit concluded that the bankruptcy court had the constitutional authority to enter its orders because

the determination of whether the property belonged to the bankruptcy estate was inextricably tied to the question of who was entitled to the funds. Both matters therefore were "intimately tied to the traditional bankruptcy functions and the estate, and, therefore, are core matters within the clear jurisdiction of the bankruptcy court." *Johnson,* 960 F.2d at 402. The Fourth Circuit's conclusion that the bankruptcy court had the authority to enter a final order hinged on the fact that, just as in the instant case, the debtor was in possession of the property in dispute. *Id.* As the Eleventh Circuit explained in a subsequent case, *In re Electric Machinery Enterprises, Inc.*, 479 F.3d 791, 797 (11th Cir. 2007), the debtor's possession of the disputed asset is what gave the bankruptcy court the authority to enter a final order in *Johnson.*

Unlike the Fourth Circuit, the Seventh Circuit ignored the teachings of this Court and thus failed to recognize the central importance that determinations about property of the estate historically have had in bankruptcy cases. "Bankruptcy jurisdiction, as understood today and at the time of the framing, is principally *in rem* jurisdiction." *Central Va. Cmty. College*, 546 U.S. at 369. "In bankruptcy, 'the court's jurisdiction is premised on the debtor and his estate, and not on the creditors.'" *Id.* at 370 quoting *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004).

Indeed, historically, non-Article III judicial officers exercised this *in rem* jurisdiction over the

debtor and all property in the debtor's actual or constructive possession. *See* 2A Collier on Bankruptcy, ¶ 38.09[2], at 1428-29 (James Wm. Moore *et al.* eds. 14th ed. 1978); Thomas E. Plank, *Why Bankruptcy Judges Need Not And Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 584-87, 600-10 (1998). For example, the Nation's first bankruptcy law, the Bankruptcy Act of 1800, like the English statute before it, expressly allowed bankruptcy commissioners, who were appointed by the district court, "to take into their possession, all the estate, real and personal, of every nature and description to which the said bankrupt may be entitled, either in law or equity, in any manner whatsoever, and cause the same to be inventoried and appraised to the best value." Bankruptcy Act of 1800, § 5, 2 Stat. 25 (repealed 1803). Further, the 1800 Act authorized bankruptcy commissioners to "assign, transfer, or deliver over, all and singular the said bankrupt's estate and effects. . . ." to third parties. *Id.* at § 6. The 1800 Act gave bankruptcy commissioner's power over the debtor's estate so complete that a commissioner could "imprison recalcitrant third parties in possession of the estate's assets." *Central Va. Cmty. College,* 546 U.S. at 370 citing Bankruptcy Act of 1800, § 14, 2 Stat. 25 (repealed 1803).

The power of bankruptcy referees under the Bankruptcy Act of 1898 to enter final orders determining whether property in the debtor's possession was property of the bankruptcy estate also was unquestioned. Section 38 of the 1898 Act

authorized referees to determine ownership of property in the actual or constructive possession of the bankrupt. Bankruptcy Act of 1898, § 38, 30 Stat. 544, (Code, tit. 11 U.S.C. § 66) (repealed 1978); *see* 2A Collier on Bankruptcy, ¶ 38.09[2], at 1428-29 (James Wm. Moore et al. eds. 14th ed. 1978).

In *Mueller v. Nugent*, for example, the Court held that a referee under the 1898 Act could exercise the judicial authority of the court and determine in a summary proceeding whether property claimed to be held in trust should be delivered to the bankruptcy estate. 184 U.S. at 13-15. The Court reasoned that because the Act, like the modern Code, *see* 11 U.S.C. § 541(a), vested title to a debtor's property in the bankruptcy estate upon the filing of the bankruptcy petition, all property in the debtor's actual or constructive possession on the petition date was placed by operation of law into the custody of the bankruptcy court and a referee therefore could exercise summary jurisdiction over that property. 184 U.S. at 13-15. The Court acknowledged that a referee's authority to make orders about property in the debtor's actual or constructive possession was central to the bankruptcy process, stating that the "bankruptcy court would be helpless indeed" and the "grant of jurisdiction to cause the estates of bankrupts to be collected, ... would be seriously impaired," if a referee could not do so. *Id.* at 14. *Accord Taylor v. Sternberg*, 293 U.S. 470, 471-73 (1935) (holding that referee had authority to direct turnover of property in debtor's constructive possession).

Following *Mueller*, courts of appeals decisions interpreting the 1898 Act consistently acknowledged the authority of bankruptcy referees to enter final orders regarding whether property in the debtor's possession was property of the estate. *See, e.g., White v. Murtha*, 343 F.2d 831, 832 (5th Cir. 1965) (affirming bankruptcy referee's order for the turnover property of the debtor's estate); *Heath v. Helmick*, 173 F.2d 157, 159 (9th Cir. 1949) (affirming bankruptcy referee's order holding that real property was property held by debtor's estate where debtor remained "in continuous possession" of property even though a third party held title); *In re Stewart*, 179 F. 222, 225 (6th Cir. 1910) (affirming bankruptcy referee's order holding that funds in possession of debtor's agent were property of the estate and ordering their turnover). Especially relevant here is that under the 1898 Act, a bankruptcy referee could enter final orders that property held by a debtor's alter ego was property of the estate. *E.g., Wellston Okla., Natural Gas Auth. Bondholders v. Nesbitt (In re Eufaula Enters.)*, 565 F.2d 1157, 1160-62 (10th Cir. 1977).

Decisions under the Bankruptcy Reform Act of 1978 have continued this long-standing tradition of affirming bankruptcy court orders deciding whether property in the debtor's possession is estate property without questioning the bankruptcy courts' authority to enter such final orders. *See, e.g., Daniels v. Agin*, 736 F. 3d 70, 72-73 (1st Cir. 2013) (affirming bankruptcy court's final order finding that property in the debtor's possession was estate property);

C.O.P. v. C.W. Mining Co. (In re C.W. Mining Co.), 641 F.3d 1235, 1238, 1243 (10th Cir. 2011) (same). The fact that the circuit courts have accepted virtually without question the constitutional authority of bankruptcy courts to decide whether property the debtor is holding is property of the estate is likely due to the fact, as this Court recognized, that one of the "[c]ritical features of every bankruptcy" is the bankruptcy court's control over "all of the debtor's property." *Central Va. Cmty. College*, 546 U.S. at 363-64.

Against this backdrop, the Seventh Circuit's post-*Stern* conclusion—that an action to determine whether property in the debtor's possession belongs to the bankruptcy estate does not "stem[] from the bankruptcy itself," 131 S. Ct. at 2618, and is therefore outside of a bankruptcy court's constitutional authority to decide—marks a radical departure from existing precedent. An action to determine if property in the debtor's possession is property of the bankruptcy estate cannot "exist[] without regard to any bankruptcy proceeding." *Id.* This conclusion ineluctably flows from the fact that a bankruptcy estate has no existence outside of the bankruptcy case because it is the "commencement of a case ... [that] creates an estate." 11 U.S.C. § 541(a). Thus, an action to determine what is included within a bankruptcy estate is the quintessential action that "stems from the bankruptcy itself." 131 S. Ct. at 2618. Indeed, if an action against the debtor to decide whether property he holds belongs to his bankruptcy estate is not an

action that "stems from the bankruptcy itself" it is hard to imagine what actions would meet this exception.

Granting the petition, therefore, presents the Court with the opportunity to define the parameters of what actions "stem[] from the bankruptcy itself" By holding that a debtor may unilaterally eliminate the constitutional authority of a bankruptcy court to make decisions about property in the debtor's possession simply by claiming that he holds the property in trust, the Seventh Circuit has "rendered [the bankruptcy process] practically inefficient." *Mueller*, 184 U.S. at 14.

The decision also has created considerable confusion over exactly what types of actions would "stem[] from the bankruptcy itself" that should be addressed. A debtor who files a bankruptcy petition in the Seventh Circuit can now refuse to turn over property he holds to his trustee, claiming he is the trustee of a sham trust and force the trustee to litigate the issue in district court. A debtor who files in the Fourth Circuit will be subject to the more summary proceedings before the bankruptcy court. Until the conflict is resolved, bankruptcy court orders in jurisdictions following the Fourth Circuit's view will be subject to challenge, delaying the administration of bankruptcy estates and the payment of funds owed to creditors. Further the lower courts will continue to struggle with how they should apply *Stern*.

B. The Seventh Circuit's Holding That An Action Against The Debtor Under 11 U.S.C. § 541 Is A State-Law Action Conflicts With Decisions Of The First, Fourth, Fifth, Sixth, Eighth And Tenth Circuits.

The Seventh Circuit concluded that the bankruptcy court could not enter a final order on the § 541 claim because deciding that claim required the bankruptcy court also to decide a state-law issue. The presence of that state-law issue (whether Sharif's alleged trust was a sham) caused the Seventh Circuit to conclude that the claim did not differ from the state-law counterclaim at issue in *Stern*. Pet. App. 48a.

But the two claims are fundamentally different. The claim at issue in *Stern* was not based on the Bankruptcy Code at all; instead, the debtor sued a creditor on a common law tort claim to recover money damages for an injury that occurred before the bankruptcy case began. 131 S. Ct. at 2601. The action at issue in this case is not based on the common law but on a specific provision of the Bankruptcy Code, § 541, and it is an action against the debtor. Pet. App. 8a. In the court of appeals even the debtor Sharif described the action as one based on federal law—§ 541—and argued that only the bankruptcy trustee could ask the bankruptcy court to determine whether property belonged to the bankruptcy estate. No. 12-1349, Dkt. 29 at 30-31

(7th Cir.).[2] The Seventh Circuit, however, ignored the fact that the statutory basis for the claim was a provision of the Bankruptcy Code. Instead, it focused on the fact that state law would determine whether the trust was a sham and therefore concluded that the action against the debtor was no different than the state-law counterclaim against a creditor in *Stern*. Pet. App. 48a.

The Seventh Circuit's ruling conflicts with decisions of the First, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits, all of which hold that federal bankruptcy law dictates to what extent a debtor's interest in property is property of the bankruptcy estate for purposes of 11 U.S.C. § 541. *Croft*, 737 F.3d at 374; *Tyler*, 736 F.3d at 461; *Dittmar*, 618 F.3d at 1204; *Wagers*, 514 F.3d at 1028; *The Ground Round*, 482 F.3d at 17; *Am. Bankers Ins. Co. of Fla.*, 101 F.3d at 363; *N.S. Garrott & Sons*, 772 F.2d at 466. As the Seventh Circuit itself held before *Stern*, "[t]he question of whether a debtor's interest in property is 'property of the estate' is a federal

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[2] While demonstrating that the parties below understood the action to be a federal claim based on the Bankruptcy Code, Sharif's argument that only a trustee has the ability to seek relief under § 541 is incorrect. Wellness did not seek turnover of estate property to itself; instead it sought a declaration that would benefit the estate. Creditors frequently bring such § 541 actions. *See, e.g., Shurley v. Texas Commerce Bank (In re Shurley)*, 115 F.3d 333 (5th Cir. 1997) (creditor brought suit to determine whether assets debtor claimed were held in trust were estate property); *Strong v. Page (In re Page)*, 239 B.R. 755, 759 (Bankr. W.D. Mich. 1999) (same).

question to be decided by federal law" even if "courts must look to the applicable state law to determine the extent (if any) of the Debtor's legal or equitable interest in the property." *In re Marrs-Winn Co.*, 103 F.3d 584, 591 (7th Cir. 1996).

The Seventh Circuit's post-*Stern* conclusion that § 541 property of the estate determinations against a debtor are now state-law claims "wholly independent of federal bankruptcy law" and therefore outside of the constitutional authority of bankruptcy courts to decide conflicts with the decisions of six other circuits. Pet. App. 51a. This split threatens to cause great uncertainty in the lower courts about how *Stern* should be applied. If, as the Seventh Circuit concluded, *Stern* means that bankruptcy courts may not decide state-law issues, most of the traditional work of bankruptcy courts will necessarily be transferred to the district courts.

As this Court has noted "[c]ritical" to every bankruptcy case is the collection of estate property. *Central Va. Cmty. College*, 546 U.S. at 363-64; *see also* 11 U.S.C. § 704(a)(1) (trustee's duties include collecting estate property). Yet determinations about what constitutes estate property under § 541 almost always require some reference to state law because outside of bankruptcy "[p]roperty interests are created and defined by state law." *Stern*, 131 S. Ct. at 2616; *Butner v. United States*, 440 U.S. 48, 55 (1979). As the First, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have all concluded, the fact that state law determines whether a debtor has an

interest in property does not transform the action into a state-law claim because federal law determines whether that interest qualifies as property of the estate. *See Croft*, 737 F.3d at 374; *Tyler*, 736 F.3d at 461; *Dittmar*, 618 F.3d at 1204; *Wagers*, 514 F.3d at 1028; *The Ground Round*, 482 F.3d at 17; *Am. Bankers Ins. Co. of Fla.*, 101 F.3d at 363; *N.S. Garrott & Sons*, 772 F.2d at 466. The Seventh Circuit's decision, however, means that this "critical" aspect of every bankruptcy case can no longer proceed in the bankruptcy court due to the inevitable presence of state-law issues in these disputes.

In addition to property of the estate determinations under § 541, many other Bankruptcy Code-based actions against both debtors and creditors involve considerations of state law. Objections to a debtor's exemptions under § 522, to the dischargeability of a debt under § 523, and to creditors' claims under § 502, all typically involve an interplay between state law and the Bankruptcy Code, yet courts have traditionally viewed these actions, like property of the estate determinations, as federal actions based on the Bankruptcy Code that exist only in a bankruptcy case. *See, e.g.*, *Farinash v. Stockburger (In re Stockburger)*, 106 F.3d 402 (6th Cir. 1997) (table decision) ("Section 522[] is a federal statute which has incorporated state law into its application. Upon incorporation, state law became a part of the federal statutory scheme; so it is federal law being given effect, not state law."); *In re Gupta*, 394 F.3d 347, 349-50 (5th Cir. 2004) ("the ultimate

determination of dischargeability [under § 523] is, however, a federal question" even though state law may be "important" in deciding the case); *In re Harford Sands, Inc.*, 372 F.3d 637, 640 (4th Cir. 2004) (court held allowance of a claim under § 502 is a matter of federal law even as it noted that the claim would also need to be valid under state law). Further, courts have traditionally viewed these types of actions, like property of the estate determinations, as at the core of any bankruptcy and within the constitutional authority of bankruptcy judges to decide. *Central Va. Cmty. College*, 546 U.S. at 363-64; Thomas Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 584-90, 600-10 (1998).

Until this Court clarifies the scope of the "stems from the bankruptcy itself" exception as set forth in *Stern* and addresses whether the presence of a state-law issue prevents a bankruptcy court from entering a final order, even in matters that historically always have been within the province of the bankruptcy courts to decide and are based upon specific provisions of the Bankruptcy Code, the lower courts will continue to struggle with these issues. Only this Court can resolve these issues.

II. The Court Should Resolve The Question Of Whether Article III Permits A Debtor Who Voluntarily Files For Bankruptcy To Consent To The Entry Of A Final Judgment By The Bankruptcy Court.

Relying upon *Stern*, the Seventh Circuit held that a debtor cannot, consistent with Article III, consent to the entry of a final judgment order by a bankruptcy court. Pet. App.51a-54a. But both *Stern* and the case currently before the Court, *Executive Benefits*, address the question of consent given by a party other than the debtor. Here, the party objecting to the bankruptcy court's constitutional authority is the debtor who voluntarily chose to file his bankruptcy petition necessarily understanding that he was subjecting his person and his property to the *in rem* jurisdiction of the bankruptcy court. The debtor's voluntary decision to invoke the bankruptcy court's authority makes this case fundamentally different from *Stern* and *Executive Benefits*.

Unlike a creditor who is sued by the bankruptcy estate, a debtor is in a position nearly identical to that of the litigants in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 847-50 (1986). The parties claiming an Article III violation in *Schor*, like the debtor in this case, voluntarily chose to file suit in a non-Article III forum, leading the Court to conclude that they had consented to that forum and waived their right to an Article III court. *Id.*; *cf. Granfinanciera*, 492 U.S. at 59 n.14 (noting this distinction). Thus, whatever the ruling in *Executive*

Benefits, the consent question presented by this case is fundamentally different from those the Court decided in *Stern* and may decide in *Executive Benefits*.

The issue also is ripe for this Court's consideration. The Seventh Circuit's decision that a debtor who voluntarily filed for bankruptcy continues to have the right to insist upon an Article III tribunal to decide whether property in his possession is property of his bankruptcy estate conflicts with the Sixth Circuit's decision in *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 960-61 (6th Cir. 1993). In the analogous context of Seventh Amendment jury trial rights, *McLaren* holds that a debtor who voluntarily files for bankruptcy, like Sharif did here, submits himself to the equitable jurisdiction of the bankruptcy court and consents to proceed without a jury. *Id.*

McLaren is in conflict with the Seventh Circuit's decision because this Court has equated the right to trial by jury with the right to trial by an Article III court. *Granfinanciera*, 492 U.S. at 53. The Court held in *Granfinanciera* that "if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal." *Id.* *Stern* adopts the *Granfinanciera* analysis, 131 S. Ct. at 2616, and the

two decisions together stand for the proposition that if a litigant has a right to trial by jury, he also has the right to be heard in an Article III court. *See* Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall*, 86 Am. Bankr. L.J. 121, 150-51 (2012) (explaining that *Stern* and *Granfinanciera* equate the right to a trial by jury to the right to an Article III court).

In *McLaren*, the Sixth Court concluded, relying upon *Granfinanciera*, 492 U.S. at 53, that a debtor-defendant who voluntarily initiates a bankruptcy case, thereby forcing his creditors to come to bankruptcy court, submits himself to the equitable jurisdiction of the bankruptcy courts. 3 F.3d at 960-61. *McLaren* further held that, like a creditor who, by filing a claim, transforms the action against him into an equitable action and looses the right to trial by jury, so too does the voluntary debtor. *Id.* *McLaren* thus stands for the proposition that a debtor consents to proceed before a non-Article III court by filing his bankruptcy petition; a position that conflicts with the Seventh Circuit's decision.

Further, the distinction the Court noted in *Granfinanciera* between consent to a non-Article III adjudication and submission to the bankruptcy court's equitable jurisdiction does not apply to debtors. The Court suggested in *Granfinanciera* that the two concepts were different for a creditor. It reasoned that while a creditor submits to the bankruptcy court's equitable jurisdiction by filing a

proof of claim, it does not necessarily consent in the same way the litigants did in *Schor,* 478 U.S. at 849, because a creditor lacks an alternative forum in which to pursue its proof of claim against a debtor. *Granfinanciera,* 492 U.S. at 59 n.14. In *Stern*, the Court adopted that distinction, holding that when a creditor files a proof of claim in the bankruptcy case he does not consent to proceed in a non-Article III forum because the creditor has no other forum in which to collect its claim. 131 S. Ct. at 2614.

The same, however, is not true of a debtor who voluntarily chooses, as Sharif did here, to file his bankruptcy petition. As the Court explained in *United States v. Kras*, where it held that a debtor did not have a constitutional right to file a bankruptcy case without first paying a filing fee, "bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors." 409 U.S. 434, 445 (1973). Thus, a debtor who voluntarily chooses to file a bankruptcy case, receiving the benefits bankruptcy offers such as the automatic stay and the potential to receive a discharge, is in a fundamentally different position than a creditor filing a proof of claim. A voluntary debtor truly does consent expressly to proceed before a non-Article III court. A voluntary debtor, therefore, is no different from the litigants in *Schor*, who had a choice of proceeding on their claims in either federal district court or before a CFTC administrative law judge. 478 U.S. at 849. By holding that the debtor Sharif could not consent to a non-Article III adjudication, the Seventh Circuit's

decision conflicts with the Sixth Circuit's decision in *McLaren* and this Court's decision in *Schor*.

Consequently, the Court should grant *certiorari* to address whether a debtor consents to the authority of the bankruptcy court to decide those actions that arise against the debtor in the context of his bankruptcy case.

III. In The Event The Court Does Not Address Either Of The Questions At Issue In *Executive Benefits*, It Should Grant The Writ In This Case To Allow Those Issues To Be Decided.

This case also raises two questions currently before the Court in *Executive Benefits*, 133 S. Ct. 2880 (2013) (No.12-1200): (a) assuming the Court were to conclude that there is no distinction between debtors and creditors, *see infra Section II herein*, whether litigants can give their implied consent to the entry of a final order by a bankruptcy judge; and (b) whether a bankruptcy court has the statutory authority to enter proposed findings of fact and conclusions of law in an action, that while denominated as core under 28 U.S.C. § 157(b)(2), is outside of the bankruptcy court's constitutional authority to decide.

It is not clear that this Court will have to decide either or both of these two questions to rule in *Executive Benefits* given the unique procedural posture of that case. The respondent in *Executive Benefits* argues that the Court does not have to, and

should not, reach the constitutional issue of consent because petitioner "received the full Article III review it desired." Brief of Respondent at 54, *Executive Benefits Ins. Agency v. Arkison*, No. 12-1200 (Nov. 8, 2013). In *Executive Benefits*, the district court reviewed the bankruptcy court's summary judgment order *de novo* and "accorded the bankruptcy court no deference." *Id.* at 54-55. Thus, the respondent argues that the question of consent is moot because an Article III judge entered judgment after a *de novo* review. *Id.* If the question of consent is moot, so too will be the second question addressing whether there is a statutory gap in § 157.

If this Court agrees with the respondent in *Executive Benefits*, the circuits will continue to be divided on both of these important questions, making *certiorari* on these issues in this case extremely important.

A. The Split Among The Circuits Concerning The Question Of Consent Continues To Deepen.

Addressing the question of consent continues to be important. At the time this Court granted review in *Executive Benefits*, only two circuits had addressed the issue: the Sixth Circuit held a non-debtor litigant could not consent, *Waldman v. Stone*, 698 F.3d 910, 917-18 (6th Cir. 2012), and the Ninth Circuit held a non-debtor litigant could consent, both expressly and implicitly through its litigation conduct, *Executive Benefits Insurance Agency v.*

Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553, 556-57 (9th Cir. 2012). Since then, three additional courts of appeals' decisions have addressed this question. The Seventh Circuit held in the instant case that a debtor could not implicitly consent. Pet. App. 33a-45a. In a subsequent decision, the Seventh Circuit distinguished between implied and express consent and suggested that a creditor's express consent might authorize a bankruptcy court to enter a final order. *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741, 747 (7th Cir. 2013). The Fifth Circuit has adopted the reasoning of the Sixth Circuit in a case where the objecting party was a debtor and held that all forms of consent are impermissible. *See BP RE, L.P. v. RML Waxahachie Dodge, L.L.C. (In re BP RE, L.P.)*, 735 F.3d 279, 286-87 (5th Cir. 2013). Only this Court can resolve this conflict and ensure uniformity in the lower courts on this important issue.

B. The Circuits Are Split On Whether There Is A Statutory Gap In 28 U.S.C § 157(b).

The circuits also are clearly divided on the question of whether there is a statutory gap in § 157 that precludes a bankruptcy court from presiding over or recommending proposed findings in a matter that before *Stern* would have been viewed as core, but is now outside of the bankruptcy court's constitutional authority to decide. Since the Court granted review of this issue in *Executive Benefits*, the Seventh Circuit also has held in this case that there is a statutory gap. Pet. App. 51a-54a.

This issue needs to be resolved to ensure the efficient administration of bankruptcy cases. If there is a statutory gap, Congress is unlikely to remedy the statutory problem until this Court rules on the issue. If there is no statutory gap (which petitioner submits is the case), until this question is decided, bankruptcy courts in the Seventh Circuit will not be able to preside over or have anything to do with unconstitutional core proceedings, while continuing to have the authority under § 157(c) to preside over non-core matters. The Seventh Circuit directed on remand that the district court had to restart the proceedings from scratch, including allowing additional time for discovery, notwithstanding Sharif's prior discovery violations—violations the Seventh Circuit found sufficient to sustain the judgment on the discharge counts. Pet. App. 54a, 58a-65a. This means that in the Seventh Circuit the parties to a bankruptcy court judgment that is successfully challenged based upon *Stern* will be required to re-litigate everything in the case.

This result is anomalous given that it means that bankruptcy courts can have no part in actions that Congress, and historical precedent and practice, deemed most central to bankruptcy administration, such as the § 541 determination at issue in this case. *See Gecker v. Flynn (In re Emerald Casino, Inc.)*, 459 B.R. 298, 300 n.1 (Bankr. N.D. Ill. 2011) (describing this result as "bizarre"). This also will undoubtedly result in significant litigation gamesmanship. For example, a non-creditor defendant subject to the bankruptcy court's authority under § 157(c) to

recommend a ruling has a ticket out of the bankruptcy court merely by filing a proof of claim. Once the proof of claim is filed, the lawsuit becomes a counterclaim against a creditor, falling under § 157(b)(2)(C), the provision held unconstitutional in *Stern* and thus, under the Seventh Circuit's decision in this case, no longer capable of being decided in the bankruptcy court.

In the circuits where the issue has not been resolved, litigants will face inevitable challenges to district court orders based on bankruptcy courts' proposed findings in unconstitutional core matters. At least five judicial districts have enacted local standing orders directing the bankruptcy courts to enter proposed findings and conclusions of law in unconstitutional core proceedings and all of the judgments entered pursuant to these standing orders will continue to be subject to challenge by the losing party until the question of whether there is a statutory gap is decided. *See* Tyson A. Crist, *Stern v. Marshall: Application of the Supreme Court's Landmark Decision in the Lower Courts*, 86 Am. Bankr. L.J. 627, 679 n.290 (2012) (listing jurisdictions with such orders).

Until this question is resolved, the authority of bankruptcy courts to recommend rulings in these circumstances remains subject to challenge, threatening the efficient administration of the courts and the validity of the orders based upon such proposed rulings. The ability of district courts to address the problem through standing orders also

remains subject to challenge. Only this Court can clarify this issue in a uniform manner across the circuits.

* * *

Granting *certiorari* here provides an additional vehicle for this court to address the questions of consent and the purported statutory gap in 28 U.S.C. § 157. In the alternative, this Court should hold this case pending its resolution of ***Executive Benefits*** and grant, vacate, and remand this case for further consideration in light of this Court's decision in the above-mentioned case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, or, in the alterative, the Court should hold this case pending the Court's resolution of *Executive Benefits*, and depending on the decision in that case, grant the petition to address any questions left unresolved in *Executive Benefits* or remand this case to the Seventh Circuit Court of Appeals for further consideration.

Respectfully submitted,

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APPENDIX

Appendix A

In the

United States Court of Appeals

For the Seventh Circuit

No. 12-1349

WELLNESS INTERNATIONAL NETWORK, LIMITED, RALPH OATS AND CATHY OATS,

Plaintiffs-Appellees,

v.

RICHARD SHARIF,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:10-cv-05303 — **Harry D. Leinenweber**, *Judge.*

ARGUED SEPTEMBER 18, 2012 - DECIDED AUGUST 21, 2013

Before FLAUM, SYKES, and TINDER, *Circuit Judges.*

TINDER, *Circuit Judge*. This appeal is the most recent chapter in a decade-long saga spanning two circuits involving the debtor, Richard Sharif, and his judgment creditors, Wellness International Network, Ltd., Ralph Oats, and Cathy Oats (collectively, "WIN"). After being slapped with a judgment in excess of $650,000 in the Northern District of Texas as a sanction for his failure to engage in discovery, Sharif filed for Chapter 7 bankruptcy in the Northern District of Illinois. WIN filed a five-count adversary complaint in the bankruptcy court. Counts I through IV sought to prevent discharge of Sharif's debts under 11 U.S.C. § 727, and Count V sought a declaratory judgment that a trust of which Sharif was trustee was in fact Sharif's alter ego. Sharif continued his evasive and dilatory tactics, failing to respond to WIN's and the bankruptcy trustee's discovery requests. The bankruptcy court ordered Sharif to comply with the discovery requests and warned him that failure to do so would result in a default judgment. Sharif tendered some discovery but his responses fell far short of full compliance. After a hearing, the bankruptcy judge issued an opinion and order entering default judgment in WIN's favor and subsequently awarded attorney's fees to WIN. Sharif appealed to the district court. *See* 28 U.S.C. § 158(a)(1).

After the bankruptcy judge's entry of judgment but before briefing on the appeal in the district court, the Supreme Court decided *Stern v. Marshall*, 131 S. Ct. 2594 (2011), in which it held that a bankruptcy court lacked constitutional

authority to enter final judgment on a debtor's state-law counterclaim against a creditor, even though Congress had granted the bankruptcy court statutory authority to do so. A few months after *Stern* was decided, Sharif filed his opening brief in the district court, but he did not challenge the bankruptcy judge's authority to enter final judgment on the adversary complaint. In December 2011, Sharif's sister filed a motion in the district court to withdraw the reference on the basis of *Stern*. Later that month, our court decided *Ortiz v. Aurora Health Care, Inc.* (*In re Ortiz*), 665 F.3d 906 (7th Cir. 2011), in which we dismissed a direct appeal from a bankruptcy court on the ground that there was no final judgment because the bankruptcy judge had lacked constitutional authority to enter one under *Stern*. Shortly thereafter, Sharif filed a motion for supplemental briefing in the district court so that he could advance a *Stern* argument. The district judge denied both motions as untimely, holding that a *Stern* objection to a bankruptcy judge's authority to enter final judgment is waivable and that Sharif's failure to raise it earlier constituted waiver, and affirmed the bankruptcy court's entry of default judgment. Sharif's sister did not appeal the denial of her motion to withdraw the reference, but Sharif appealed the balance of the district court's decision to this court.

We hold that a constitutional objection based on *Stern* is not waivable because it implicates separation-of-powers principles. We also hold that the bankruptcy judge lacked constitutional authority to enter a final judgment on the alter-ego claim. In

contrast, we hold that the bankruptcy judge had constitutional authority to enter final judgment on the first four counts of the adversary complaint, each of which were objections to the discharge of Sharif's debts. Finally, we hold that the entry of default judgment and awarding of fees were proper sanctions under the circumstances, though we remand for a recalculation of fees.

I. Background

A. Texas Litigation

The parties' relationship began when Sharif entered into distributorship contracts with WIN for the sale of health and wellness products. In January 2003, Sharif and others sued WIN in the Northern District of Illinois claiming that WIN was running a pyramid scheme. *Sharif v. Wellness Int'l Network, Ltd.*, 376 F.3d 720, 722 (7th Cir. 2004). In 2004, our court reversed the district court's denial of WIN's motion to compel arbitration on some of the claims. *Id.* at 726-27. On remand, the district court dismissed without prejudice the claims that were not subject to arbitration pursuant to forum-selection clauses in the contracts requiring suit to be filed in the Northern District of Texas, and this court affirmed. *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759 (7th Cir. 2006).

Sharif and his co-plaintiffs refiled their suit in the Northern District of Texas. *See In re Sharif*, 447 B.R. 853, 854 (Bankr. N.D. Ill. 2011). They ignored WIN's discovery requests, resulting in the material

facts being deemed admitted against them. The district court subsequently granted summary judgment for WIN, and the Fifth Circuit affirmed, observing as follows:

> A review of the record on appeal demonstrates that Appellants' untimely performance in this court mirrors a lengthy history in the district court of dilatoriness and hollow posturing interspersed with periods of non-performance or insubstantial performance and compliance by Appellants and their counsel, leaving the unmistakable impression that they have no purpose other than to prolong this contumacious litigation for purposes of harassment or delay, or both. The time is long overdue to terminate Appellants' feckless litigation at the obvious cost of time and money to the Defendants by affirming all rulings of the district court but remanding the case to that court for the reinstatement of its consideration of Appellees' motion for attorney's fees. In so doing, we caution Appellants that any further efforts to prolong or continue proceedings in this court, including the filing of petitions for rehearing, will potentially expose them to the full panoply of penalties, sanctions, damages, and double costs pursuant to FRAP 38 at our disposal.

Sharif v. Wellness Int'l Network, Ltd., 273 F. App'x 316, 317 (5th Cir.), *cert. denied*, 555 U.S. 1085 (2008). On remand, the district court awarded $655,596.13 in attorney's fees to WIN as a sanction against Sharif and his co-plaintiffs. No. 3:05—CV-01367—B, 2008 WL 2885186 (N.D. Tex. July 22, 2008).

Thereafter, WIN served Sharif with post-judgment discovery requests to discover Sharif's assets, but Sharif ignored them. In November 2008, the Texas district court granted WIN's motion to compel discovery and ordered Sharif to respond to WIN's outstanding discovery requests; Sharif ignored the court's order and failed to appear for his deposition. WIN followed-up with a motion for civil contempt. In February 2009, Sharif was arrested and held in civil contempt for discovery violations, but the Texas district court released him on his own recognizance after he promised to respond to the post-judgment discovery requests and to reimburse WIN for fees and other costs associated with the motion to compel and the motion for civil contempt. *See* 447 B.R. at 855; *Wellness Int'l Network v. J.P. Morgan Chase Bank, N.A.*, 407 B.R. 316, 318 (Bankr. N.D. Ill. 2009). Sharif again ignored the district court's orders.

B. Sharif Files for Bankruptcy

Two weeks later, on February 24, 2009, Sharif filed for bankruptcy under Chapter 7 in the Northern District of Illinois. The bankruptcy petition listed WIN as a creditor, along with various members of

Sharif's family to whom he allegedly owed $271,000 in undocumented loans. WIN was the only creditor to file a proof of claim.

At some point, WIN obtained a June 14, 2002, loan application that Sharif had submitted to the now-defunct Washington Mutual on which he claimed to have owned the following assets: (1) three businesses worth $2,400,000; (2) three parcels of real property worth $1,400,000; (3) a retirement account worth $1,400,000; and (4) three bank accounts containing $180,000 in cash ("Loan Assets"). Thus, in 2002 Sharif had represented to a financial institution that he had assets worth $5,380,000, and Washington Mutual had approved a loan based on those representations. WIN had requested documents related to these assets during the Texas litigation, but Sharif had never tendered them.

On March 25, 2009, the bankruptcy trustee, Horace Fox, Jr., held the initial creditors' meeting, *see* 11 U.S.C. § 341, and at this meeting both WIN and Fox requested that Sharif provide documents related to the Loan Assets; Fox continued the meeting until April so that Sharif could gather the documents. On April 21, the § 341 creditors' meeting resumed but Sharif failed to provide the requested documentation. Instead, Sharif informed WIN and Fox that he had lied on the loan application and that he never had owned the Loan Assets; rather, those assets were owned by the Soad Wattar Trust, of which Sharif was trustee. WIN then requested that Sharif produce documentation evidencing the formation and funding of the Soad Wattar Trust. Fox

again continued the § 341 meeting so that Sharif could gather the requested documents, but Sharif never produced any of them.

C. Adversary Proceeding

WIN subsequently initiated an adversary proceeding in the bankruptcy court. The amended complaint asserted five counts: Count I alleged that Sharif had "continuously concealed property that he owns by holding such property in the name of the Soad Wattar Living Trust with improper intent to deceive" in violation of 11 U.S.C. § 727(a)(2)(A). Count II alleged that Sharif had "concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information" in violation of § 727(a)(3). Count III alleged that Sharif had knowingly and fraudulently made a false oath or account with regard to his bankruptcy case in violation of § 727(a)(4)(A). Count IV alleged that Sharif had failed to explain the disappearance of the more than $5 million of Loan Assets in violation of § 727(a)(5). And Count V sought a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 that the Soad Wattar Trust is Sharif's alter ego and that its assets should therefore be treated as part of Sharif's bankruptcy estate.

On February 10, 2010, WIN served requests for production and interrogatories on Sharif in both his individual capacity and in his capacity as trustee for the Soad Wattar Trust; all responses were due on March 15. On March 12, Sharif requested an indefinite extension of time to respond to all

discovery requests; his counsel indicated that Sharif had gone to Syria to tend to his terminally ill mother. On March 24, Sharif failed to appear for his deposition and through counsel filed a motion for an extension of time, which the bankruptcy court subsequently denied. WIN's counsel and Sharif's counsel conferred on April 13 to resolve the unfulfilled discovery requests. WIN requested that Sharif provide complete responses to the outstanding discovery requests by April 23 and provide potential dates for his deposition. Sharif's counsel did not agree to these requests because he did not know if or when Sharif would return to the United States.

On April 15, WIN filed a motion for sanctions and, in the alternative, a motion to compel discovery. On April 21, the bankruptcy court granted WIN's motion to compel discovery, ordering "[t]hat Richard Sharif, individually and as Trustee has to April 28, 2010 to comply with all of [WIN's] outstanding discovery requests, including document production, interrogatories, and [Rule] 2004 examination, and *it is further ordered that in the event Richard Sharif fails to comply by April 28, 2010, an order of default will be entered against him in the proceeding*, and the [Motion for Sanctions] is continued for proof of compliance to April 28, 2010." (Emphasis added.) The bankruptcy court's order effectively gave Sharif a six-week extension from the date his discovery responses were initially due. On April 27, Sharif produced approximately 1,500 pages of documents; the court rescheduled the hearing on the motion for May 24 to allow WIN time to review whether the tendered discovery fulfilled the discovery requests.

WIN finally deposed Sharif on May 13. Sharif admitted that he had not provided any documentation concerning the creation and funding of the Soad Wattar Trust. Nor had he provided source data and documents used to complete his tax returns or his signed tax returns. He also admitted that he had not provided information about multiple bank accounts. On May 20, more than three weeks after the court-ordered deadline, Sharif's counsel produced additional documents. The bankruptcy court held a hearing on May 24 and took the matter under advisement. Almost a month later, on June 22, Sharif filed a motion for summary judgment.

On July 6, the bankruptcy court issued its opinion and order entering default judgment for WIN on all five counts of the adversary complaint. The bankruptcy judge found that Sharif had violated the discovery order as follows:

- Sharif and his attorney had signed the interrogatory responses as trustee of the Soad Wattar Trust but the responses lacked a statement of verification as required by Federal Rule of Civil Procedure 33(b) (made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7033), *see, e.g., Hindmon v. Nat'l Ben Franklin Life Ins. Corp.*, 677 F.2d 617, 619 (7th Cir. 1982).

- Sharif had not signed the interrogatory responses directed toward him in his

individual capacity; only his attorney had signed them.

- Sharif had ignored the bankruptcy court's October 20, 2009, order requiring that he turn over documents related to the Loan Assets to Fox.

- Sharif had failed to turn over documents related to the Loan Assets in response to WIN's requests for production.

- Sharif had failed to produce any documents related to any trust in which he had an interest, despite the fact that in his sworn bankruptcy petition he had claimed to control property of the Richard Sharif Revocable Trust.

- Sharif had failed to produce bank statements and account records relating to himself and the Soad Wattar Trust and instead provided only names and addresses of three financial institutions with corresponding account numbers.

- Sharif had failed to produce documents relating to his personal bank accounts and instead stated that the documents were available at JP Morgan Chase Bank.

- Sharif had failed to disclose AG Edwards accounts in his bankruptcy petition, and he had failed to produce documents concerning those accounts.

- He had failed to produce documents concerning approximately $752,050 in assets held by AG Edwards in joint tenancy for Sharif and his mother, Soad Wattar, and he had failed to produce any documents to support his deposition testimony that those assets had been transferred to Wachovia.

- He had failed to produce documents related to a variable annuity worth $39,248 held at AG Edwards for his and his sister's benefit as joint tenants.

- Sharif had failed to disclose information related to numerous other accounts that he had admitted having an interest in during his deposition.

- Sharif had failed to disclose why he no longer held a 10% ownership interest in Logan Square MRI & Diagnostic Center, Inc., that he had once claimed.

- Sharif had failed to disclose why he no longer held 100% ownership interest in Sharif Pharmacy, though he had claimed such an interest on his 2002 federal tax return—he said the tax return was incorrect and that he owns only a 10% interest in the pharmacy, but he provided no documentation of that interest.

- Sharif had failed to produce corporate records of Sharif Pharmacy and Hermosa Medical Center after 2006.

- Sharif had failed to produce documents evidencing the formation and funding of the Soad Wattar Trust.

    - He claimed that the trust had been funded with a $2 million inheritance that had been transferred by international wire from Beirut, Lebanon, through Dubai, United Arab Emirates, but he did not produce any documents related to such a transfer.

    - He had failed to produce documents showing transfers of assets to the Soad Wattar Trust, with the exception of one house.

    - He had produced amendments to the Soad Wattar Trust but he had not produced the original trust instrument.

- Sharif had failed to produce his signed federal and state tax returns.

- Sharif had failed to produce the source documents used to prepare his tax returns.

- Sharif had failed to produce documents related to the $271,000 that he allegedly owed his family members.

The bankruptcy court rejected Sharif's contention that, while there were deficiencies, he had made a good-faith effort to comply with all discovery requests. It also noted that Sharif's "supplemental production" on May 20 had occurred several weeks after the court-imposed April 28 deadline and after the May 13 deposition. In response to Sharif's argument that WIN had not consulted with his attorney *after* the discovery had been tendered, the bankruptcy court noted "that a phone call would have been futile because [Sharif] was so grossly out of compliance with his discovery obligations." The court concluded that Sharif had "failed to comply with most of [WIN's] discovery requests" and that his "lack of compliance is a pattern that has continued from the time of the underlying litigation in Texas to the instant bankruptcy case and adversary proceeding." Accordingly, the bankruptcy judge entered a default judgment in WIN's favor on all five counts of the adversary complaint and ordered Sharif to pay WIN's attorney's fees.

Judgment was entered in both the bankruptcy proceeding and the adversary proceeding. Subsequently, on August 9, the bankruptcy court issued an order awarding WIN $54,405.99 in attorney's fees and $8,349.75 in other costs in connection with the motion for sanctions. And on November 18, the court awarded WIN additional fees and other costs it had incurred in connection with the § 341 creditors' meetings. Sharif timely appealed all four judgments to the district court.

D. Appeal to the District Court

On August 9, 2011, Sharif filed his opening appellate brief in the district court, asserting only two claims of error. First, he argued that his right to due process under the Fifth Amendment had been violated because WIN had not conferred with his counsel after the discovery responses were tendered, so he was never given notice of the particular deficiencies prior to the hearing on the motion for sanctions. Second, he argued that the bankruptcy court had abused its discretion in entering a default judgment because he had been a trustee of the Soad Wattar Trust, not a beneficiary.

On December 12, 2011, Ragda Sharifeh, Sharif's sister, filed a motion to withdraw the reference in the district court.[1] She argued that the bankruptcy court had lacked jurisdiction to enter a final judgment on WIN's adversary complaint under *Stern v. Marshall*, 131 S. Ct. 2594 (2011). On January 12, 2012, Sharif filed a motion for supplemental briefing on *Stern* and this court's then-two-week-old decision in *In re Ortiz*, 665 F.3d 906 (7th Cir. 2011).

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[1] This was not Ragda's first attempt to undo the bankruptcy court's judgment. *See* 457 B.R. 702, 720-32 (Bankr. N.D. Ill. 2011); 447 B.R. 853, 865-68 (Bankr. N.D. Ill. 2011); 446 B.R. 870, 883-85 (Bankr. N.D. Ill. 2011). Indeed, Ragda initiated her own adversary proceeding against Sharif and Fox (though she asserted claims only against Fox), which the bankruptcy court dismissed. 457 B.R. at 720-32. Her appeal of that dismissal is currently pending before a different district judge.

The district court denied both Ragda's motion to withdraw the reference and Sharif's motion for supplemental briefing as untimely and affirmed the bankruptcy court's judgment. *Sharifeh v. Fox*, Nos. 11 C 8811, 09 BK 05868, 09-AP-00770, 10-AP-02239, 10 C 5303, 10 C 5333, 10 C 6057 & 11 C 175, 2012 WL 469980 (N.D. Ill. Feb. 10, 2012). With regard to the *Stern* issue, the court assumed that Ragda had standing to raise the issue but concluded that objections based on the bankruptcy court's authority to enter a final judgment are waivable because they do not implicate subject-matter jurisdiction and that, by failing to raise the issue sooner, Ragda had voluntarily waived the issue. *Id.* at *5-7. It similarly denied Sharif's motion for supplemental briefing because, although *Ortiz* had only recently been decided, *Stern* had been decided a month and a half before Sharif submitted his opening brief, yet Sharif had not raised the issue then. *Id.* at *10. On the merits, the court applied a deferential standard of appellate review, considering whether the bankruptcy court's entry of sanctions constituted an abuse of discretion and whether its factual findings were clearly erroneous. *Id.* at *7. It first rejected Sharif's due-process argument, concluding that Sharif had received notice and an opportunity to be heard and that the bankruptcy court had expressly warned Sharif in its April 21 order that failure to comply with the discovery requests would result in a default judgment. *Id.* at *8-9. The court then concluded that the bankruptcy judge had not abused her discretion in finding that Sharif had failed to comply with the order compelling discovery and that he had acted willfully and in bad faith. *Id.* at *9. The

district court therefore affirmed the four judgments of the bankruptcy court in their entirety, *id.* at *10, and Sharif now appeals (though Ragda does not).

Between his opening and reply briefs, Sharif raises several issues in this court. Specifically, he contends that the bankruptcy court lacked jurisdiction to enter a final judgment under *Stern*; that the bankruptcy court abused its discretion in awarding default judgment as a discovery sanction; that the bankruptcy court erred in awarding fees and costs to WIN; that the judgment on Count V is void because Illinois law required WIN to join the Soad Wattar Trust's beneficiaries; and that the alter-ego claim should have been brought by Fox, not WIN. The purple elephant in this case is whether the bankruptcy court had authority to enter a final judgment and, if not, whether that is an issue that may be waived. We begin there.

II. The Bankruptcy Court's Authority

Sharif argues that the bankruptcy court lacked constitutional authority to enter final judgment, default or otherwise, on WIN's adversary complaint under the holdings of *Stern v. Marshall*, 131 S. Ct. 2594 (2011), and *In re Ortiz*, 665 F.3d 906 (7th Cir. 2011). WIN responds that Sharif waived this argument by failing to present it sooner and, through his litigation conduct, consented to final adjudication by the bankruptcy judge. Sharif replies that this issue is not waivable and may be raised at any time.

As we discuss later, whether Sharif's objection to the bankruptcy court's constitutional authority is waivable is a thorny question. The only two circuits to have addressed the issue head-on since *Stern* was decided issued their respective decisions after we heard oral argument in this appeal and came to opposite conclusions. *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 566-70 (9th Cir. 2012) (waivable), *cert. granted*, 133 S. Ct. 2880 (2013) (No. 12-1200); *Waldman v. Stone*, 698 F.3d 910, 917-18 (6th Cir. 2012) (not waivable), *cert. denied*, 133 S. Ct. 1604 (2013). On June 24, 2013, the Supreme Court granted a petition for a writ of certiorari in the case from the Ninth Circuit, which raised the issue of whether a *Stern* objection is waivable. *Exec. Benefits Ins. Agency v. Arkison*, 133 S. Ct. 2880 (2013) (No. 12-1200). A final answer to that question is likely to be rendered when the Supreme Court decides that case next term. But we think the path to resolution of that issue is sufficiently clear that we should address it now rather than further extending the litigation between Sharif and WIN by waiting for the conclusion of the *Executive Benefits* case. We therefore proceed to consider Sharif's appeal, but before addressing the constitutional issues, we must determine whether the bankruptcy court had statutory authority to enter final judgment on WIN's claims. *In re Ortiz*, 665 F.3d at 911; *see Stern*, 131 S. Ct. at 2604-08.

A. Statutory Authority

District courts have "original and exclusive jurisdiction of all cases under title 11," and they have

original jurisdiction "of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a)-(b). Bankruptcy courts are units of the district courts, 28 U.S.C. § 151, and the bankruptcy judges "serve as judicial officers of the United States district courts established under Article III of the Constitution," §152(a)(1). The district courts may refer "any or all" bankruptcy cases and proceedings to their respective district's bankruptcy judges, § 157(a), which is how the bankruptcy judge came to preside over Sharif's bankruptcy proceedings and WIN's adversary complaint, *see* N.D. Ill. Local R. 40.3.1(a).

Congress has granted bankruptcy judges the authority to hear, determine, and enter final orders and judgments in "all cases under title 11 and all core proceedings," subject to traditional appellate review in the district court. §§ 157(b)(1) & 158. Proceedings "that arise in a bankruptcy case or under Title 11" are "core proceedings." *Stern*, 131 S. Ct. at 2605; *see also* § 157(b)(2) (providing nonexhaustive list of sixteen types of core proceedings). Proceedings that do not arise in a bankruptcy case or under title 11 but are otherwise related to a case under title 11 are noncore proceedings. *See Stern*, 131 S. Ct. at 2604-05. A bankruptcy judge may hear noncore proceedings but, absent consent of the parties, *see* § 157(c)(2), may only "submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after

reviewing de novo those matters to which any party has timely and specifically objected," § 157(c)(1).

The first four counts of WIN's adversary complaint clearly are core matters, and Sharif does not argue otherwise. In those counts, WIN objected to the discharge of Sharif's debts under 11 U.S.C. § 727(a). Congress has explicitly identified "objections to discharges" as core proceedings. 28 U.S.C. § 157(b)(2)(J). The bankruptcy court therefore had statutory authority to enter final judgment on WIN's first four claims.

Sharif asserts that the fifth count, the alter-ego claim, is a noncore matter, which would mean that the bankruptcy court lacked statutory authority to enter final judgment unless the parties consented. Unlike objections to discharge, alter-ego claims are not expressly listed as core proceedings in § 157(b)(2), but that list is not exhaustive and the fact that it is a state-law claim is not dispositive, *see* § 157(b)(3) ("A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law."). Courts have reached differing conclusions as to whether alter-ego claims are core matters. *Compare Cent. Vt. Pub. Serv. Corp. v. Herbert*, 341 F.3d 186, 192 (2d Cir. 2003) (core), *with Mirant Corp. v. Southern Co.*, 337 B.R. 107, 117 (N.D. Tex. 2006) (noncore). But we need not determine whether the alter-ego claim is core or noncore because Sharif has waived the issue. Unlike the murky issue of waiver surrounding the bankruptcy court's constitutional authority, it is clear that a party can waive an

argument concerning the core/noncore status of a claim under § 157. *See Stern*, 131 S. Ct. at 2606-08; *Waldman*, 698 F.3d at 917-18. Sharif never argued in either the bankruptcy court or the district court that the alter-ego claim was a noncore matter. *See, e.g., Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) ("It is a well-established rule that arguments not raised to the district court are waived on appeal." (citations omitted)). Furthermore, in this court, he merely asserts in his jurisdictional statement that the alter-ego claim was not a core matter, without any supporting argument or authority. *See, e.g., United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam) ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim." (citation omitted)). So we proceed on the assumption that the alter-ego claim was a core proceeding over which the bankruptcy court had authority under § 157(b)(1) to enter final judgment, but the existence of statutory authority will not justify the bankruptcy court's actions if the court lacked constitutional authority, *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-79 (1803).

B. Constitutional Authority

Article III, § 1, vests the "judicial Power of the United States" in a judiciary with judges who enjoy life tenure (subject to removal only by impeachment) and whose salaries may not be diminished. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955). "Article III is 'an inseparable element of the constitutional system of checks and balances' that 'both defines the power and protects the

independence of the Judicial Branch.'" *Stern*, 131 S. Ct. at 2608 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion)). It "could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III." *Id.* at 2609. Therefore, as a general rule, Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855). So suits that are made of "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," *N. Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in judgment), must be decided by Article III judges when brought within the bounds of federal jurisdiction. *Stern*, 131 S. Ct. at 2609.

Bankruptcy judges are not Article III judges. They are appointed to 14-year terms "by the court of appeals of the United States for the circuit in which [their] district is located," 28 U.S.C. § 152(a), and a bankruptcy judge may be removed "for incompetence, misconduct, neglect of duty, or physical or mental disability" by a majority vote of "the judicial council of the circuit in which the judge's official duty station is located," § 152(e). And although by statute their salaries are equivalent to "92 percent of the salary of a judge of the district court of the United States," § 153(a), since they are not Article III judges their

salaries may be diminished by Congress, *cf. N. Pipeline*, 458 U.S. at 53 (plurality opinion).

Stern v. Marshall held that a bankruptcy court lacked authority under Article III, § 1, to enter final judgment on a bankruptcy petitioner's state-law counterclaim for tortious interference that was not resolved in the process of ruling on a creditor's proof of claim. 131 S. Ct. at 2620. But *Stern* was not the Supreme Court's first foray into the Article III thicket surrounding bankruptcy judges and, as explained shortly, the Court's decision in *Stern* was heavily influenced by its two previous decisions concerning Article III limitations in the bankruptcy context.

In *Northern Pipeline*, the Court held that a bankruptcy court lacked constitutional authority to enter final judgment on a debtor's state-law contract claim against a noncreditor, but no rationale commanded a majority of the Justices. 458 U.S. at 63-87 (plurality opinion); *id.* at 90-92 (Rehnquist, J., concurring in judgment). A majority, however, agreed on two basic principles, namely, that adjudication of the contract claim at issue did not implicate the so-called "public rights" doctrine, *id.* at 67-76 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in judgment), and that the bankruptcy courts were not mere adjuncts to the district courts, *id.* at 76-87 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in judgment). After *Northern Pipeline*, Congress enacted the current statute, the Bankruptcy Act of 1984, in which (among other changes) it created the core/noncore distinction.

A few years later, the Court returned to the Article III issue presented by bankruptcy courts, albeit in a less direct manner. In *Granfinanciera, S.A. v. Nordberg*, a bankruptcy trustee had brought an action to recover an allegedly fraudulent monetary conveyance from third parties that had not submitted claims against the bankruptcy estate, and the third parties had demanded a jury trial under the Seventh Amendment. 492 U.S. 33, 36-37 (1989). The Court explained that "the question whether the Seventh Amendment permits Congress to assign [a cause of action's] adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal." *Id.* at 53. It then concluded that the fraudulent-conveyance actions at issue could be resolved only by Article III courts because they did not involve "public rights" and instead were "quintessentially suits at common law that ... resemble[d] state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate." *Id.* at 56. As a result, the Court held that the third parties were constitutionally entitled to a jury trial, notwithstanding the fact that Congress had designated fraudulent-conveyance actions as core proceedings. *Id.* at 36, 49-64.

Stern v. Marshall involved a long-running dispute between Vickie Marshall (commonly known as Anna Nicole Smith) and Pierce Marshall concerning the sizeable will of J. Howard Marshall (Vickie's husband and Pierce's father). Before J. Howard died and left Vickie nothing in his will, she

filed suit in Texas probate court claiming that Pierce had fraudulently induced J. Howard to sign a living trust that excluded her and that J. Howard had intended to give Vickie half his estate. *Id.* at 2601. After J. Howard died, Vickie filed for bankruptcy in the Central District of California. Pierce filed a complaint in the bankruptcy proceeding, asserting that Vickie had defamed him and seeking a declaration that his defamation claim was not dischargeable in the bankruptcy proceedings. He subsequently filed a proof of claim for the defamation action so that he could recover damages for it from Vickie's bankruptcy estate. *See* 11 U.S.C. §§ 523(a) & 501(a). Vickie responded with a counterclaim for tortious interference with the gift she had expected from J. Howard, the same claim that she had asserted in Texas probate court. 131 S. Ct. at 2601. The bankruptcy court granted summary judgment for Vickie on Pierce's defamation claim and, after a bench trial, entered judgment for Vickie on her counterclaim. In response to Pierce's objection that the bankruptcy court lacked jurisdiction over Vickie's counterclaim, the bankruptcy court concluded that Vickie's counterclaim was a core proceeding under 28 U.S.C. § 157(b)(2)(c) and, therefore, that it had power to enter judgment on the counterclaim under § 157(b)(1). 131 S. Ct. at 2601-02. Meanwhile, the Texas probate court had conducted a jury trial on the merits of the tortuous-interference suit and had entered judgment in Pierce's favor. *Id.* at 2602.

Pierce appealed to the district court, which held that Vickie's counterclaim was *not* a "core proceeding" under § 157(b)(2)(C). Accordingly, the

district court treated the bankruptcy court's judgment as proposed, not final, and conducted de novo review in accordance with §157(c)(1). Even though by that time the Texas probate court had already issued its judgment, the district court declined to give that judgment preclusive effect and found in Vickie's favor. 131 S. Ct. at 2602. The Ninth Circuit reversed on a different issue and in turn was reversed by the Supreme Court in *Marshall v. Marshall*, 547 U.S. 293 (2006). On remand, the Ninth Circuit held that Vickie's counterclaim was not a core proceeding, which meant that the Texas probate court's judgment had been first in time and that the district court had erred in failing to give that judgment preclusive effect. *In re Marshall*, 600 F.3d 1037, 1055-65 (9th Cir. 2010). The Supreme Court again granted certiorari, 131 S. Ct. 63 (2010), but this time it affirmed the Ninth Circuit, albeit on different grounds.

The Court first rejected Pierce's argument (and the Ninth Circuit's holding) that Vickie's counterclaim was not "a core proceeding" under § 157(b)(2)(C), which specifies that core proceedings include "counterclaims by the estate against persons filing claims against the estate." 131 S. Ct. at 2604-05; *see also id.* at 2605 ("Under our reading of the statute, core proceedings are those that arise in a bankruptcy case or under Title 11."). As a result, the Court held that the bankruptcy court had been granted statutory authority to enter judgment on the counterclaim. *Id.* at 2605.

After addressing another statutory argument (which we explore later), the Court turned to the constitutionality of the bankruptcy court's entry of final judgment and concluded that the bankruptcy court had impermissibly exercised the "judicial Power of the United States." *See id.* at 2620 ("The Bankruptcy Court below lacked the constitutional authority to enter final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditors' proof of claim."). The Court reasoned that the state-law counterclaim did not involve "public rights" and did not stem from a federal statutory scheme or involve a particularized area of law. *Id.* at 2614-15; *see also Granfinanciera*, 492 U.S. at 54-56. Rather, it "involve[d] the most prototypical exercise of judicial power: the entry of final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime." *Id.* at 2615.

The Court then rejected Vickie's argument that Pierce's filing of a claim in the bankruptcy proceeding took her counterclaim outside the confines of Article III, explaining that Pierce's defamation claim did not affect "the nature of Vickie's counterclaim for tortious interference as one at common law that simply attempt[ed] to augment the bankruptcy estate." *Id.* at 2616. Vickie based her argument on both *Katchen v. Landy*, in which the Court held that a bankruptcy referee could rule on a trustee's voidable-preference claim against a creditor who had filed a claim because resolution of the

preference issue was necessary to resolve the creditor's claim, 382 U.S. 323, 329-36 (1966), and *Langenkamp v. Culp*, in which the Court held that a preferential-transfer claim against a creditor who had filed a claim could be heard in bankruptcy because under those circumstances "the ensuing preference action by the trustee become[s] integral to the restructuring of the debtor-creditor relationship," 498 U.S. 42, 44 (1990) (per curiam). But *Katchen and Langenkamp* were distinguishable, the Court explained, because unlike in those cases there "was never reason to believe that the process of ruling on Pierce's proof of claim would necessarily result in the resolution of Vickie's counterclaim." *Stern*, 131 S. Ct. at 2617. Another difference was that the preference actions in *Katchen and Langenkamp* were rights of recovery created by federal bankruptcy law, whereas Vickie's counterclaim was neither derived from nor dependent upon bankruptcy law but instead was "a state tort action that exist[ed] without regard to any bankruptcy proceeding." *Id.* at 2618. The Court concluded "that Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.*

The Court also rejected Vickie's argument that the bankruptcy courts were merely "adjuncts" of the district courts. *See id.* at 2618-19; *see also N. Pipeline*, 458 U.S. at 84-86 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in judgment). Bankruptcy courts, the Court explained, "do not

'ma[k]e only specialized, narrowly confined factual determinations regarding a particularized area of law' or engage in 'statutorily channeled factfinding functions.'" 131 S. Ct. at 2618 (brackets in original) (quoting *N. Pipeline*, 458 U.S. at 85 (plurality opinion)). Rather, they "resolve '[a]ll matters of fact and law in whatever domains of the law to which' the parties' counterclaims might lead," *id.* at 2618-19 (brackets in original) (quoting *N. Pipeline*, 458 U.S. at 91 (Rehnquist, J., concurring in judgment)), thereby exercising "the essential attributes of judicial power," *id.* at 2618. And unlike the adjunct agency in *Crowell v. Benson*, which had no independent authority to enforce its orders and instead relied on the district courts' decisions to enforce or set aside the agency's orders, 285 U.S. 22, 44-45, 51-65 (1932), "a bankruptcy court resolving a counterclaim under 28 U.S.C. § 157(b)(2)(C) has the power to enter 'appropriate orders and judgments' — including final judgments — subject to review only if a party chooses to appeal." 131 S. Ct. at 2619 (citing §§ 157(b)(1), 158(a)—(b)). In view of its authority to make the final determination in core proceedings, the Court concluded, "a bankruptcy court can no more be deemed a mere 'adjunct' of the district court than a district court can be deemed such an 'adjunct' of the court of appeals." *Id.*

In re Ortiz applied *Stern* and held that a bankruptcy court lacked constitutional authority to enter final judgment on debtors' claims that were grounded in Wisconsin law. 665 F.3d at 911-14. Aurora Health Care, Inc., had filed proofs of claim in approximately 3,200 bankruptcy cases in the Eastern

District of Wisconsin that had listed the debtors' medical treatment information. *Id.* at 908. A group of debtors (actually, two groups) filed a class-action lawsuit against Aurora, alleging that Aurora had willfully violated a Wisconsin statute barring disclosure of patients' healthcare records. The bankruptcy judge dismissed the suit on summary judgment, concluding that the Wisconsin statute required proof of actual damages and that the debtors had failed to marshal evidence of actual damages. *Id.* at 910; *see* 430 B.R. 523, 534-358 (Bankr. E.D. Wis. 2010). A few months before *Stern* was decided, we authorized the parties to bring a direct appeal to this court under 28 U.S.C. § 158(d)(2).

Based on *Stern*, we held that, although the debtors' claims were "core proceedings," the bankruptcy court had lacked constitutional authority to enter final judgment. *In re Ortiz*, 665 F.3d at 911-14. The debtors' disclosure claims, we explained, were "simply ordinary state-law claims," in all material respects identical to the counterclaim in *Stern*: they involved private parties litigating interests defined by state law that were not historically determined by the executive or legislative branches; no governmental parties were involved; the claims did "not flow from a federal statutory scheme," *id.* at 913; and the claims did not involve "a particularized area of the law" where Congress had established a body with particular expertise to determine certain factual matters in an efficient and inexpensive manner. *Id.* at 914 (quotations omitted) (citing *Stern*, 131 S. Ct. at 2609,

2612-16). Also, just as in *Stern*, the fact that Aurora had filed "proofs of claim in the debtors' bankruptcies did not give the bankruptcy judge authority to adjudicate the debtors' state-law claims." *Id.* While there was some factual overlap between the debtors' claims and Aurora's proofs of claim, the debtors' claims were not necessarily resolvable in the claims-allowance process, nor were they "'integral to the restructuring of the debtor-creditor relationship.'" *Id.* (quoting *Stern*, 131 S. Ct. at 2617). The debtors' claims simply sought "'to augment the bankruptcy estate — the very type of claim that ... must be decided by an Article III court.'" *Id.* (quoting *Stern*, 131 S. Ct. at 2616). Therefore, the bankruptcy judge had lacked constitutional authority to enter final judgment on the debtors' claims, *id.*, and because there was no final judgment, we had to dismiss the appeal for lack of appellate jurisdiction, *id.* at 915; *see* 28 U.S.C. § 158(d).

Sharif contends that under *Stern* and *Ortiz* the bankruptcy judge lacked constitutional authority to enter final judgment on WIN's adversary complaint, in particular the alter-ego claim. Under ordinary principles of waiver, however, Sharif's argument is not preserved because he waited too long to assert it. But the parties dispute whether ordinary principles of waiver apply to a *Stern* objection.

1. Waiver

WIN asserts, and the district court held, that *Stern* itself indicates that Sharif's Article III

objection is waivable and that, through his litigation conduct and failure to raise the objection sooner, Sharif in fact waived it. *See Sharifeh*, 2012 WL 469980, at *10; *see also id.* at *5-7 (denying Ragda's motion to withdraw the reference on the ground that she had waived her *Stern* objection). Sharif, on the other hand, contends that his *Stern* objection is not waivable and can be raised at any time because it concerns the bankruptcy court's subject-matter jurisdiction. Neither view is persuasive.

In *Stern*, the Court held that Pierce had waived his alternative, nonconstitutional argument that the bankruptcy court had lacked jurisdiction over his defamation claim under 28 U.S.C. § 157(b)(5) ("personal injury tort and wrongful death claims shall be tried in the district court"). 131 S. Ct. at 2606-08. The Court reasoned that neither the text nor the context of § 157(b)(5) had the hallmarks of a jurisdictional statute and explained that "we are not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such." *Id.* at 2607 (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006)). Section 157 in general merely "allocates the authority to enter final judgment between the bankruptcy court and the district court" and "does not implicate questions of subject-matter jurisdiction." *Id.* (citations omitted). And § 157(b)(5) merely "specifies where a particular category of cases should be tried." *Id.* The Court held that these "statutory limitation[s]" were waivable and that, given his "course of conduct" in the bankruptcy court, Pierce had "consented to that court's resolution of his

defamation claim (and [had] forfeited any argument to the contrary)." *Id.* at 2607-08.

At first blush, then, *Stern* appears to support WIN's waiver argument. But there is a significant difference between the waived objection in *Stern* and Sharif's objection, namely, the argument in *Stern* concerned only the bankruptcy court's *statutory* authority, whereas Sharif's argument concerns the bankruptcy court's *constitutional* authority. We discern nothing in *Stern* that supports the proposition that a party may waive an Article III objection to a bankruptcy judge's entry of final judgment. In point of fact, a different portion of the *Stern* opinion casts serious doubt on whether notions of waiver and consent have any role in bankruptcy, given that creditors must go to the bankruptcy court to pursue their claims. *See* 131 S. Ct. at 2614-15 & n.8; *see also Granfinanciera*, 492 U.S. at 59 n.14. For these reasons, we do not think *Stern* supports WIN's position.

As for Sharif's argument, it is true that questions of subject-matter jurisdiction may be raised at any time, as parties cannot consent to subject-matter jurisdiction; indeed, such questions must be considered by a court *sua sponte*. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804). But we disagree with Sharif that his Article III, § 1, objection concerns the bankruptcy court's subject-matter jurisdiction, for several reasons. First, as noted above, *Stern* held that § 157 constitutes a statutory allocation of

authority between the bankruptcy courts and the district courts, and Article III, § 1, can be viewed similarly, that is, as an allocation of authority between Article III courts and non-Article III courts. Second, in resolving the constitutional issue in *Stern*, the Court never asserted that the bankruptcy court in that case had lacked subject-matter jurisdiction; rather, it held that "[t]he Bankruptcy Court ... lacked the *constitutional authority* to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim," 131 S. Ct. at 2620 (emphasis added). Third, the constitutional bases of federal subject-matter jurisdiction are set forth in Article III, § 2, whereas Sharif's objection to the bankruptcy court's entry of final judgment is based on Article III, § 1. Finally, Sharif's reliance on *Ortiz* for the proposition that a *Stern* objection is jurisdictional is misplaced, as the jurisdictional issue in *Ortiz* concerned whether there was a valid final judgment for purposes of *appellate* jurisdiction, given the unique procedural posture of that appeal (a direct appeal from the bankruptcy court); *Ortiz* did *not* hold that the bankruptcy court had lacked jurisdiction. Consequently, we do not think the waiver issue can be resolved under the well-established principle that questions of subject-matter jurisdiction are not waivable. Nevertheless, we agree with Sharif that under current law his constitutional objection to the bankruptcy court's entry of final judgment is not waivable.

Although consent has no role under Article III, § 2, the Supreme Court has acknowledged a limited role for notions of consent and waiver under Article

III, § 1. *See Stern*, 131 S. Ct. at 2613-14; *id.* at 2625-26, 2627-28 (Breyer, J., dissenting); *Peretz v. United States*, 501 U.S. 923, 936-39 (1991); *Granfinanciera*, 492 U.S. at 59 n.14; *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-57 (1986); *cf. Roell v. Withrow*, 538 U.S. 580 (2003) (holding that under 28 U.S.C. § 636(c)(1) parties may consent to proceedings before a magistrate judge through their litigation conduct).

This appears to stem from the fact that § 1 protects two separate interests — it safeguards litigants' right to have their cases decided by independent and impartial judges, and it also operates as an inseparable element of separation of powers by protecting the judicial branch from encroachment by the political branches. *Stern*, 131 S. Ct. at 2608-09; *Schor*, 478 U.S. at 848-50; *N. Pipeline*, 458 U.S. at 58 (plurality opinion). The guarantee of an independent and impartial judiciary serves primarily to protect personal interests, and so it "is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Schor*, 478 U.S. at 848-49 (citations omitted). The role that § 1 plays in our system of checks and balances, however, protects the larger structural interests of our constitutional government, and "[t]o the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2." *Id.* at 850-51 (citation

omitted). "When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." *Id.* at 851; *see also Freytag v. C.I.R.*, 501 U.S. 868, 896-98 (1991) (Scalia, J., concurring in judgment). But *cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995) (rejecting proposition "that legal defenses based upon doctrines central to the courts' structural independence can never be waived"); *Freytag*, 501 U.S. at 893-901 (same).

The dual nature of Article III, § 1, renders notions of waiver and consent more nuanced than they are in other areas. The practical problem, of course, is the difficulty of separating out the waivable personal safeguard from the nonwaivable structural safeguard, for in every case an argument that a party waived the personal protection can be met with the argument that the court must still consider the objection because the structural aspect cannot be waived. The net result would be that an Article III, § 1, argument can never be waived and that parties can never consent to adjudication by a non-Article III tribunal, which would render *Schor's* discussion of the waivability of the personal protections meaningless. But a close examination of *Schor* demonstrates how this difficulty is to be resolved.

Schor involved an Article III challenge to an agency's authority to decide a state-law counterclaim. A customer brought a claim for

reparations against his commodity futures broker before the Commodity Futures Trading Commission (CFTC), and the broker filed a state-law counterclaim for the same amount. After the CFTC ruled in favor of the broker on both the claim and the counterclaim, the customer appealed on the ground that the CFTC's adjudication of the counterclaim ran afoul of Article III, § 1. The Court held that the CFTC's assumption of jurisdiction over the state-law counterclaim was not unconstitutional. Although the customer had consented to proceed before the CFTC rather than an Article III court, *id.* at 849-50, the Court explained that consent could not be dispositive due to the structural interests protected by Article III, § 1, *id.* at 851. The Court then examined several factors and held that "the congressional scheme [did] not impermissibly intrude on the province of the judiciary." *Id.* at 851-52. While the counterclaim at issue was a private right (rather than a public right) traditionally decided by courts, the Court found it significant that the CFTC dealt only with a "particularized area of law," *id.* at 852 (quoting *N. Pipeline*, 458 U.S. at 85 (plurality opinion)); the CFTC's adjudicatory powers departed from the traditional agency model in only one respect, its jurisdiction over state-law counterclaims, *id.*; like in *Crowell*, 285 U.S. 22, the CFTC's orders were enforceable only by a district court, its factual findings were reviewed under a "weight of the evidence" standard, and its legal conclusions were reviewed de novo, *Schor*, 478 U.S. at 853; and the CFTC's counterclaim jurisdiction was "limited to that which [was] necessary to make the reparations procedure workable," *id.* at 856. Therefore, the Court

concluded, "the magnitude of any intrusion on the Judicial Branch [could] only be termed *de minimis*." *Id.*; *see also Peretz*, 501 U.S. at 936-37 (holding that a criminal defendant in a felony trial may consent to jury selection presided over by a magistrate judge: no structural issues were implicated because magistrates were appointed and subject to removal by Article III judges; the district court made the ultimate decision to invoke the magistrate's assistance, subject to veto by the parties; and the decision whether to empanel the jury whose selection was overseen by the magistrate remained entirely with the trial judge).

As noted earlier, since we heard oral argument, two of our sister circuits have addressed the waiver issue head-on and have come to divergent conclusions; both circuits relied on *Schor*. In *Waldman v. Stone*, the Sixth Circuit held that a *Stern* objection to the bankruptcy court's constitutional authority is not waivable. 698 F.3d at 917-18. Stone filed for bankruptcy and initiated an adversary proceeding against Waldman, seeking both discharge of his debts to Waldman and affirmative relief (e.g., fraud, specific performance). After a bench trial, the bankruptcy court discharged Stone's obligations and awarded him a little over $3 million on his affirmative claims. *Id.* at 915-16. On appeal, the court held that Waldman could and had in fact waived any objection to the bankruptcy court's *statutory* authority, but it held that Waldman could not waive the *constitutional* objection. *Id.* at 917-18. The court rejected the argument that, in bankruptcy cases like Stone's, the "personal right" character

predominates. *Id.* While acknowledging that the case did not pose a great risk of aggrandizement of the legislative and executive branches, the court explained that this took "too narrow a view of the interests preserved by Article III," which is also concerned with diminution of the judicial branch. *Id.* at 918; *see also id.* ("To the extent that Congress can shift the judicial Power to judges without [the tenure and salary] protections, the Judicial Branch is weaker and less independent than it is supposed to be." (citing *Schor*, 478 U.S. at 850)). And because Waldman's objection implicated both his personal rights and the structural interests advanced by Article III, the objection could not be waived. *Id.*

The Ninth Circuit reached the opposite conclusion in *In re Bellingham Insurance Agency, Inc.*, 702 F.3d at 566-70. In that case, Bellingham Insurance Agency, Inc., filed a Chapter 7 bankruptcy petition, after which the trustee filed a complaint against Executive Benefits Insurance Agency, Inc., seeking to recover allegedly fraudulent conveyances and to hold Executive Benefits liable for Bellingham's debts. The bankruptcy court granted summary judgment to the trustee, and the district court affirmed. Prior to oral argument before the Ninth Circuit, Executive Benefits argued for the first time that the bankruptcy judge was constitutionally prohibited from entering final judgment on the trustee's claims. *Id.* at 557. The court held that Executive Benefits had waived its right to have an Article III judge decide the matter, *see id.* at 566-70, finding the waivable nature of an Article III, § 1, objection to be "well established," *id.* at 566-67 (citing

MacDonald v. Plymouth Cnty. Trust Co., 286 U.S. 263, 267 (1932)). Like the Sixth Circuit it relied on *Schor*. "Following the genesis of the modern bankruptcy system, the Supreme Court clarified that 'Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States ... serves to protect primarily personal, rather than structural, interests.'" *Id.* at 567 (quoting *Schor*, 478 U.S. at 848). In a footnote, the court acknowledged that Schor held "that 'notions of consent and waiver cannot be dispositive' of Article III problems when 'the encroachment or aggrandizement of one branch at the expense of the other' is at stake, because in such cases structural principles are implicated in addition to private rights entitlements." *Id.* at 567 n.9 (quoting *Schor*, 478 U.S. at 850-51). But it reasoned that while aggrandizement was an issue in *Schor* (because that case involved an executive agency adjudicating a state-law counterclaim), "the allocation of authority between bankruptcy courts and district courts *does not implicate structural interests*, because bankruptcy judges are 'officer[s] of' the district court and are appointed by the Courts of Appeals." *Id.* (emphasis added) (citing 28 U.S.C. §§ 151, 152(a)(1)). Therefore, the court concluded, "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver." *Id.* at 567 (quoting *Schor*, 478 U.S. at 848). In another footnote, the court commented that it is this principle that allows "federal magistrate judges, acting with the consent of the litigants, to enter final judgments in proceedings that would otherwise be

the exclusive province of Article III courts." *Id.* at 567 n.10 (citing 28 U.S.C. § 636(c)(1)). It also noted that consent to a magistrate's entry of final judgment "may be implied from a litigant's actions." *Id.* (citing *Roell*, 538 U.S. at 586-87). Finally, the court observed that "§ 157(c)(2) expressly provides that bankruptcy courts may enter final judgments in non-core proceedings 'with the consent of all the parties to the proceeding,'" *id.* at 567, and it concluded that "[i]f consent permits a non-Article III judge to decide finally a non-core proceeding, then it surely permits the same judge to decide a core proceeding in which he would, absent consent, be disentitled to enter final judgment," *id.*

We think the Sixth Circuit has the better view under current law. *Schor* holds that waiver or consent may be a factor in determining whether delegation of judicial business to non-Article III tribunals is unconstitutional, but it cannot be dispositive because of the structural role of Article III, § 1. And *Stern* unequivocally holds that 28 U.S.C. § 157(b) violates the structural protections of Article III, § 1, in permitting a bankruptcy judge to enter final judgment in certain "core proceedings." In other words, unlike *Schor*, where party consent was permissible because the statutory scheme at issue did not implicate structural concerns, the Supreme Court has already held that the statutory scheme granting bankruptcy judges authority to enter final judgment in core proceedings *does* implicate structural concerns where the core proceeding at issue is "'the stuff of the traditional actions at common law tried by the courts at Westminster in

1789,'" *Stern*, 131 S. Ct. at 2609 (quoting *N. Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in judgment)). Therefore, we cannot agree with our colleagues on the Ninth Circuit that the allocation of authority between bankruptcy courts and district courts with regard to core proceedings does not implicate structural interests. We also observe that in *Stern* the Court rejected the proposition that the fact that bankruptcy judges are appointed by Article III judges makes a difference; the Court explained that since it was the bankruptcy court itself that "exercise[d] 'the essential attributes of judicial power [that] are reserved to Article III courts,' it [did] not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings. The constitutional bar remain[ed]." *Id.* at 2619 (second alteration in original) (quoting *Schor*, 478 U.S. at 851).

It is true that under 28 U.S.C. § 157(c)(2) parties may consent to final resolution of a noncore proceeding by a bankruptcy judge, but we do not think that this inexorably leads to the conclusion that parties may consent to final adjudication of a core proceeding by a bankruptcy judge or waive a *Stern* objection. For one thing, the Supreme Court has not passed on the constitutionality of § 157(c). *Cf. Stern*, 131 S. Ct. at 2615 n.8 (observing that "the notion of 'consent' does not apply in bankruptcy proceedings as it might in other contexts"); *Granfinanciera*, 492 U.S. at 59 n.14 ("Parallel reasoning [to *Schor*] is unavailable in the context of bankruptcy proceedings, because creditors lack an alternative forum to the bankruptcy court in which

to pursue their claims."). In any event, the statutory scheme established by Congress for core proceedings differs in significant respects from the scheme for noncore proceedings. Whereas Congress has vested bankruptcy judges with authority to enter final orders and judgments in core proceedings subject only to review by the district court under traditional appellate standards, *see* §§ 157(b), 158(a), in noncore proceedings Congress has vested bankruptcy judges with authority to hear the matter and submit proposed findings of fact and conclusions of law to the district court, and it is the district court that enters final judgment after de novo review, § 157(c)(1). Section 157(c)(2) permits a bankruptcy judge to enter final judgment in a noncore proceeding, but only if the parties consent and the district court decides to refer the matter to the bankruptcy court. Thus, a strong argument can be made that with respect to noncore proceedings Congress has left the essential attributes of judicial power to Article III courts, and so the structural interests at issue with regard to core proceedings are not present under the current statutory scheme applicable to noncore proceedings, thereby allowing room for notions of waiver and consent. *Cf. Peretz*, 501 U.S. at 936-37; *United States v. Raddatz*, 447 U.S. 667, 681-84 (1980) (holding that there was no Article III impediment to a magistrate judge's submission of proposed findings of fact and conclusions of law concerning suppression motion because ultimate suppression decision was made by the district judge). In this case we need not, and do not, express an opinion on the constitutionality of § 157(c)(2), or for that matter § 636(c)(1), which

permits litigants to consent to entry of final judgment by a magistrate judge, *cf. Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399, 404-07 (5th Cir. 2012) (declining to hold that *Stern* affected a magistrate judge's authority to enter final judgment on a state-law counterclaim under § 636(c)(1)). Our discussion is intended only to show that, unlike the Ninth Circuit, we do not think that a party's *Stern* objection to a bankruptcy court's entry of final judgment in a core proceeding is waivable simply because Congress has authorized litigants to consent to a bankruptcy judge's final adjudication of a noncore proceeding.[2]

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[2] We also disagree with the Ninth Circuit that *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263 (1932), supports the notion that the waivability of an Article III, § 1, objection is "well established." *In re Bellingham Ins. Agency, Inc.*, 702 F.3d at 566-67. Prior to the Bankruptcy Act of 1978, federal district courts served as bankruptcy courts and employed a "referee" system. *See N. Pipeline*, 458 U.S. at 53 (plurality opinion). In *MacDonald*, the Court held that the parties could consent to have an action to set aside voidable preferences summarily tried by a referee —i.e., the parties could agree to waive the benefits of the procedures employed in plenary suits tried to the district courts. 286 U.S. at 265-68. But *MacDonald* was decided on statutory grounds — the question was whether the referee had *statutory* jurisdiction, and the Court's holding was based on its conclusion that the relevant statutory definitions of "courts" and "court of bankruptcy" included the referee. *Id.* at 268. The *MacDonald* Court did not mention the Constitution, let alone Article III, § 1. Furthermore, as the plurality in *Northern Pipeline* observed, the particular adjunct functions exercised by the bankruptcy referees prior to the 1978 Act were "never ... explicitly endorsed by" the Supreme Court, and the bankruptcy courts created under the 1978 Act, which are very similar to the bankruptcy courts in existence today, differed

In sum, we hold that under current law a litigant may not waive an Article III, § 1, objection to a bankruptcy court's entry of final judgment in a core proceeding. We thus turn to consider Sharif's constitutional objection to the bankruptcy court's authority, despite the fact that he waited so long to assert it.

2. The Bankruptcy Court Lacked Constitutional Authority

Sharif maintains that the bankruptcy judge lacked constitutional authority to enter final judgment on Count V of WIN's adversary complaint, the alter-ego claim. He concedes, however, that the bankruptcy court had authority to enter final judgment on the first four counts of the complaint, which objected to discharge of Sharif's debts under 11 U.S.C. § 727. We agree with Sharif on both points.

The first four counts of the complaint sought to prevent discharge of Sharif's debts. These claims stem from federal law, not state law, as the provisions of 11 U.S.C. § 727 provide the relevant

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significantly from the old referee system. 458 U.S. at 79 n.31. We simply do not see how a decision interpreting an old statute that differs considerably from current law can support the proposition that waiver of an Article III, § 1, objection is "well established." *See Plaut*, 514 U.S. at 232 n.6 ("Of course the unexplained silences of our decisions lack precedential weight." (citations omitted)); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (citations omitted)).

rules of decision. Moreover, whether to grant or deny discharge is central to the restructuring of the debtor-creditor relationship. Although it is debatable whether such restructuring falls under the rubric of public rights, *see Stern*, 131 S. Ct. at 2614 n.7; *Granfinanciera*, 492 U.S. at 56 n.11; *but cf. N. Pipeline*, 458 U.S. at 71 (plurality opinion) ("[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages ... . The former may well be a 'public right,' but the latter obviously is not."), it is clear that WIN's objections to discharge differ markedly from the state-law claims at issue in *Stern*, *Granfinanciera*, *Northern Pipeline*, and *Ortiz*. The Supreme Court has not come close to holding that an Article III judge must decide claims for which the Bankruptcy Code itself provides the rule of decision, and we will not do so here, where the parties concede that the bankruptcy judge had authority.

Our analysis of the alter-ego claim is somewhat hampered by the posture of this case. Because the bankruptcy court entered default judgment it had no need to address the merits of the alter-ego claim and thus no need to identify what WIN substantively would have been required to show to establish that the Soad Wattar Trust was Sharif's alter ego, and the parties have not filled that informational void. Our independent research of Illinois law reveals that the alter-ego theory of liability most commonly, if not exclusively, arises in the context of piercing the corporate veil, in which

creditors attempt to disregard the corporate form to reach the personal assets of the shareholders. *See, e.g., Van Dorn Co. v. Future Chem. & Oil Corp.*, 753 F.2d 565, 569-73 (7th Cir. 1985); *Main Bank v. Baker*, 427 N.E.2d 94, 101-02 (Ill. 1981). "Piercing the corporate veil" is an equitable doctrine that depends on the circumstances in each case. *Koch Refining v. Farmers Union Cent. Exch., Inc.*, 831 F.2d 1339, 1345 (7th Cir. 1987); *see Main Bank*, 427 N.E.2d at 102. There are two showings that must be made to establish that a corporation is merely an alter ego: "'first, there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and second, circumstances must be such that an adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.'" *Koch Refining*, 831 F.2d at 1345 (quoting *Gallagher v. Reconco Builders, Inc.*, 415 N.E.2d 560, 563-64 (Ill. App. Ct. 1980)); *see also Main Bank*, 427 N.E.2d at 101. "The degree of control one entity holds over another [(i.e., the first element)] has been measured in Illinois by evidence of misrepresentation; commingling of funds, assets, or identities; undercapitalization; failure to operate at arm's length; and failure to comply with corporate formalities." *Koch Refining*, 831 F.2d at 1345 (citing *Main Bank*, 427 N.E.2d at 102); *see also Van Dorn Co.*, 753 F.2d at 570 (listing similar factors). "Once the first element of the test is established, *either* the sanctioning of a fraud (intentional wrongdoing) *or* the promotion of injustice, will satisfy the second element." *Van Dorn Co.*, 753 F.2d at 570.

It is unclear whether Illinois recognizes an analogous alter-ego theory to disregard the separate legal identity of a trust. *Cf. In re Vebeliunas*, 332 F.3d 85, 90 (2d Cir. 2003) ("The question whether the 'alter ego theory' of piercing applies to trusts is a matter of state law." (citation omitted)). WIN cites no cases to support such a cause of action, and the only case cited by Sharif involved a court's refusal to impose a resulting trust due to the party's inequitable conduct, *see Am. Nat'l Bank & Trust v. Vinson*, 653 N.E.2d 13, 15-16 (Ill. App. Ct. 1995). But we proceed on the assumption that such a theory exists and that it is governed by the standards for piercing the corporate veil because the parties have so assumed and the merits are not at issue in this appeal.

In almost all material respects, WIN's alter-ego claim is indistinguishable from the tortious-interference counterclaim in *Stern*, the fraudulent-conveyance claim in *Granfinanciera*, the contract claim in *Northern Pipeline*, and the disclosure claims in *Ortiz*. The alter-ego claim is a state-law claim that does not involve "public rights." The dispute is between private parties and involves no governmental parties. It stems from state law rather than a federal regulatory scheme. And it does not involve a particularized area of law. Instead, it is a commonlaw claim for which state law provides the rule of decision, and it is intended only to augment the bankruptcy estate. *See Stern*, 131 S. Ct. at 2611-15; *Granfinanciera*, 492 U.S. at 49-59; *N. Pipeline*, 458 U.S. at 67-76 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in judgment); *In re Ortiz*,

665 F.3d at 914. Furthermore, it is beyond dispute that the bankruptcy court was not acting as an adjunct to the district court. *See Stern*, 131 S. Ct. at 2618-19; *N. Pipeline*, 458 U.S. at 76-87 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in judgment).

WIN argues that the bankruptcy court had authority to enter judgment on the alter-ego claim because WIN had to establish that the Soad Wattar Trust was Sharif's alter ego in order to establish the grounds for denying discharge under 11 U.S.C. § 727. Though it is not clear, WIN appears to be trying to fit this case within the narrow confines of *Katchen*, 382 U.S. at 329-36, and *Langenkamp*, 498 U.S. at 44, but for several reasons we are not persuaded. First, WIN's alter-ego claim technically was asserted against a nonparty to the bankruptcy proceedings, the Soad Wattar Trust (of which Sharif was trustee). The holdings of *Katchen* and *Langenkamp* can come into play only where the party against whom the action is asserted has filed a claim against the bankruptcy estate. *See Stern*, 131 S. Ct. at 2615-18; *In re Ortiz*, 665 F.3d at 914. Second, while the alter-ego claim may have some overlap with the objections to discharge, nothing indicates that it has any relation to the claims-allowance process. *See Stern*, 131 S. Ct. at 2618 ("Congress may not bypass Article III simply because a proceeding may have some bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process."); *In re Ortiz*, 665 F.3d at 914. Third, the trustees' rights of recovery in

Katchen and *Langenkamp* were creatures of federal bankruptcy law, whereas the alter-ego claim here, like the counterclaim in *Stern*, "is in no way derived from or dependent upon bankruptcy law; it is a state [claim] that exists without regard to any bankruptcy proceeding." *Stern*, 131 S. Ct. at 2618. Finally, it simply cannot be said that by resolving WIN's objections to discharge the bankruptcy court necessarily would have needed to resolve the alter-ego claim. To be sure, there is some factual overlap, particularly with respect to Count I, which alleged that Sharif had continuously concealed property in the Soad Wattar Trust with intent to deceive. But in passing on the merits of the alter-ego claim, the bankruptcy court would have had to determine, first, whether Illinois law recognizes an alter-ego theory for piercing a trust and, second, whether the evidence satisfied the applicable standard. Assuming that the standard for trust piercing is similar to that for corporate-veil piercing, that would require not only a showing of concealment of assets in the trust with intent to deceive, but also that there was a unity of ownership (or a merger of the legal and equitable estates, in trust lingo) such that the trust and Sharif ceased to exist as separate entities. Thus, even if we could look past the facts that the Soad Wattar Trust did not file a claim and that the objections to discharge have nothing to do with the claims-allowance process, we cannot say that in resolving WIN's claims under 11 U.S.C. § 727 the bankruptcy court *necessarily* would have resolved the alter-ego claim had it reached the merits (as opposed to entering default judgment). *See Stern*, 131 S. Ct. at 2617-18; *In re Ortiz*, 665 F.3d at 914.

In sum, WIN's alter-ego claim is a state-law claim between private parties that is wholly independent of federal bankruptcy law and is not resolved in the claims-allowance process. *Accord In re Madison Bentley Assocs.*, 474 B.R. 430, 439 (S.D.N.Y. 2012). Consequently, we hold that although the bankruptcy court had constitutional authority to enter final judgment on WIN's objections to discharge, it lacked constitutional authority to enter final judgment on WIN's alter-ego claim. *Cf. Waldman*, 698 F.3d at 919-21 (holding that although bankruptcy court had constitutional authority to enter final judgment on debtor's disallowance claims against creditor, it did not have constitutional authority to enter final judgment on debtor's state-law claims).

3. Remedy

So the bankruptcy court lacked constitutional authority to enter final judgment on the alter-ego claim, but what is the proper remedy? Sharif requests the relatively modest remedy of remanding to the district court and allowing him to object to the bankruptcy court's July 6, 2010, order as a report and recommendation. The district judge could then enter final judgment "after considering the bankruptcy judge's proposed findings [of fact] and conclusions [of law] and after reviewing de novo those matters to which any party has timely and specifically objected." 28 U.S.C. § 157(c)(1). While perhaps the most practical and equitable remedy, there are serious questions as to whether it is authorized by statute.

Recall that Sharif waived his contention that the alter-ego claim is a noncore proceeding and that, as a result, we proceeded on the assumption that it is a core proceeding. In core proceedings, "§157(b)(1) authorizes bankruptcy courts to '*enter* appropriate orders and judgments,' not to propose them." *Waldman*, 698 F.3d at 921. No statutory provision authorizes a bankruptcy court to propose findings of fact and conclusions of law in a core proceeding; such a report and recommendation from the bankruptcy court is statutorily authorized only in noncore proceedings, *see* § 157(c)(1). So "[f]or the bankruptcy judge's orders to function as proposed findings of fact or conclusions of law ..., we would have to hold that the [alter-ego claim was] 'not a core proceeding' but [is] 'otherwise related to a case under title 11.'" *In re Ortiz*, 665 F.3d at 915 (quoting § 157(c)(1)). *But see In re Bellingham Ins. Agency, Inc.*, 702 F.3d at 566 n.8 (rejecting *Ortiz* as not "thoroughly reasoned").

In *Waldman*, the Sixth Circuit did precisely that, even though (like Sharif) the party raising the *Stern* objection had waived his statutory argument that the affirmative claims were noncore. 698 F.3d at 921-22. The court reasoned that "the fortuity of Waldman's waiver of his own rights does nothing to diminish the bankruptcy court's authority under § 157(c)(1)." *Id.* at 922. And because the court concluded that the affirmative claims for fraud were noncore, it remanded the matter to the district court with instructions to treat the bankruptcy court's purported entry of final judgment as proposed findings and conclusions and to review them de novo under § 157(c)(1). *Id.*

We find the Sixth Circuit's approach to be reasonable, but given the total lack of argument from Sharif and WIN on whether the alter-ego claim is truly core or noncore, we will leave it to the district court to make that determination in the first instance. Because the core/noncore status of the alter-ego claim is not apparent, we explore the proper course of action should that claim turn out to be a core proceeding.

Assuming that the alter-ego claim is in fact a core matter, it is difficult to find a statutory basis on which the district court could rely to treat the bankruptcy court's order as proposed findings and conclusions. To be sure, the bankruptcy court never reached the merits of the claim because it entered default judgment as a discovery sanction. But there is no statutory provision authorizing a bankruptcy court to preside over discovery, apart from its authority over core and noncore matters. It is true that magistrate judges often preside over pretrial matters such as discovery, even if the district court ultimately decides the claims for which discovery is sought, but 28 U.S.C. § 636(b)(1)(A) expressly authorizes a district judge to "designate a magistrate judge to hear and determine any pretrial matter pending before the court," with certain exceptions and subject to reconsideration by the district judge if "the magistrate judge's order is clearly erroneous or contrary to law." No analogous statutory authorization exists for bankruptcy judges. It appears, therefore, that if the alter-ego claim is in fact a core proceeding, the only statutorily authorized remedy would be for the district court to

withdraw the reference, *see* § 157(d), and then set a new discovery schedule. Of course, this would present a windfall to Sharif, but it is difficult to see any other solution under the peculiar circumstances of this case.

Accordingly, on remand the district court shall first determine whether the alter-ego claim is a core or a noncore proceeding. If it concludes that it is a noncore proceeding, then the court may treat the bankruptcy court's order purporting to enter final judgment on the alter-ego claim as proposed findings of fact and conclusions of law to be reviewed de novo. *See* Fed. R. Bankr. P. 9033(d) ("The district judge shall make a de novo review upon the record or, after additional evidence, of any portion of the bankruptcy judge's findings of fact or conclusions of law to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the proposed findings of fact or conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instructions."). If, on the other hand, the court determines the alter-ego claim to be a core proceeding, then it shall order that the reference of the alter-ego claim to the bankruptcy court be withdrawn and conduct fresh discovery proceedings in the district court, though the district judge will have discretion in setting a more abbreviated schedule given that prior discovery has been had.

III. Appellate Jurisdiction

We must next determine what effect, if any, our holding that the bankruptcy court lacked constitutional authority to enter final judgment on the alter-ego claim has on our appellate jurisdiction over the remainder of Sharif's appeal. *See, e.g., In re Ortiz*, 665 F.3d at 910; *India Breweries, Inc. v. Miller Brewing Co.*, 612 F.3d 651, 657 (7th Cir. 2010). As noted earlier, in *Ortiz* we concluded that the bankruptcy court's lack of constitutional authority to enter final judgment on the debtors' claims deprived us of appellate jurisdiction, but that was due to the unique posture of that appeal, namely, we had permitted the parties to bypass the district court and bring a direct appeal from bankruptcy court. 665 F.3d at 914-15. Here, Sharif first appealed to the district court and then brought this appeal from the district court's judgment affirming the bankruptcy court, so *Ortiz* does not control our jurisdictional inquiry.

As a general rule, we have jurisdiction over a bankruptcy appeal that has first been appealed to the district court only if *both* the bankruptcy court's original order *and* the district court's order reviewing the bankruptcy court's original order are final. *In re Rimsat, Ltd.*, 212 F.3d 1039, 1044 (7th Cir. 2000); *see* 28 U.S.C. § 158(a)(1) & (d)(1). Finality in the bankruptcy context "is considerably more flexible than in an ordinary civil appeal taken under 28 U.S.C. § 1291," *In re Gould*, 977 F.2d 1038, 1040-41 (7th Cir. 1992), as it does not require that the entire bankruptcy proceeding have been terminated, *see,*

e.g., *In re Kilgus*, 811 F.2d 1112, 1116 (7th Cir. 1987). Rather, the test for finality in this context "is whether an order resolves a discrete dispute that, but for the bankruptcy, would have been a stand-alone suit." *Zedan v. Habash*, 529 F.3d 398, 402 (7th Cir. 2008); *In re USA Baby, Inc.*, 674 F.3d 882, 883 (7th Cir. 2012).

The bankruptcy court's order entering default judgment on WIN's adversary complaint was a final, appealable judgment, as it resolved all claims of the complaint against all parties. *See Zedan*, 529 F.3d at 402 ("We have consistently explained that the final disposition of any adversary proceeding falls within our jurisdiction."); *In re Teknek, LLC*, 512 F.3d 342, 345 (7th Cir. 2007). That the entry of default judgment was a discovery sanction makes no difference because, unlike monetary sanctions, a sanction such as default judgment or dismissal that completely eliminates the possibility of a decision on the merits is final for purposes of appeal. *See In re Golant*, 239 F.3d 931, 934-35 (7th Cir. 2001). Nor does our conclusion that the bankruptcy judge lacked authority to enter final judgment on the alter-ego claim alter finality. The only claims over which the bankruptcy judge had constitutional authority were objections to the discharge of Sharif's debts, and the denial of discharge in the adversary proceeding finally resolved those claims. *See In re Marchiando*, 13 F.3d 1111, 1113-14 (7th Cir. 1994) ("an order declaring the debt either dischargeable or not is a final, appealable order" (citing *In re Riggsby*, 745 F.2d 1153, 1154 (7th Cir. 1984))); *see also In re Weber*, 892 F.2d 534, 537 (7th Cir. 1989); *cf. Zedan*,

529 F.3d at 407 (Easterbrook, C.J., concurring) (arguing that objections to discharge are better handled as contested matters rather than adversary proceedings and requesting the appropriate committees to look into this subject, as the manner in which the objection is presented affects appellate review). There was nothing else for the bankruptcy court to do with respect to WIN's adversary complaint.

The district court's judgment affirming the bankruptcy court's judgment is also a final, appealable judgment. While it is true that a district judge's decision to remand for further proceedings in the bankruptcy court may destroy the finality of the bankruptcy court's order, *see In re Lopez*, 116 F.3d 1191, 1192 (7th Cir. 1997); *In re Riggsby*, 745 F.2d at 1155, the district judge in this case affirmed the bankruptcy court's judgment and that affirmance is a final decision, *see In re Golant*, 239 F.3d at 935; *In re Weber*, 892 F.2d at 538. That the bankruptcy court lacked constitutional authority to enter judgment on the alterego claim does not alter this conclusion. The district judge reviewed the alter-ego claim under traditional standards of appellate review rather than de novo, but that does not alter the fact that it entered a final judgment; it simply constitutes a defect in the final judgment, not a lack of finality. We thus have appellate jurisdiction under § 158(d) to consider the remaining balance of Sharif's appeal.

IV. Sanctions Were Not an Abuse of Discretion

Sharif challenges the district court's affirmance of both the default judgment and the award of attorney's fees to WIN as discovery sanctions, *see* Fed. R. Civ. P. 37(b); *see also* Fed. R. Bankr. P. 7037 (rendering Fed. R. Civ. P. 37 applicable in adversary proceedings), though he focuses almost exclusively on the default judgment. A court's imposition of sanctions under Rule 37 is reviewed for an abuse of discretion, *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (per curiam); *In re Thomas Consol. Indus., Inc.*, 456 F.3d 719, 724 (7th Cir. 2006), which requires the appealing party to demonstrate clearly "that no reasonable person would agree [with] the trial court's assessment of what sanctions are appropriate," *Marrocco v. Gen. Motors Corp.*, 966 F.2d 220, 223 (7th Cir. 1992). When reviewing a district court's affirmance of a bankruptcy court's ruling we apply the same standards as the district court, *In re Snyder*, 152 F.3d 596, 599 (7th Cir. 1998), reviewing factual findings for clear error and legal conclusions de novo, *In re UNR Indus., Inc.*, 986 F.2d 207, 208 (7th Cir. 1993).

A. Default Judgment

Sharif challenges the bankruptcy court's entry of default judgment on two fronts. First, he contends that the bankruptcy court violated his right to due process by entering default judgment without providing him notice that his discovery responses were deficient. Second, he maintains that his

discovery responses were in substantial compliance with the discovery order and, therefore, that the bankruptcy court abused its discretion in imposing the severe sanction of default. Neither argument is persuasive.

The sanctions of dismissal and entry of default judgment are strong medicine, so before a court imposes such a sanction it must find by clear and convincing evidence that the party against whom the sanction is imposed displayed willfulness, bad faith, or fault. *Maynard v. Nygren*, 332 F.3d 462, 467-68 (7th Cir. 2003). Although courts are strongly encouraged to make such a finding explicitly, on appeal it may be inferred from the sanction order. *In re Golant*, 239 F.3d at 936. Another necessity flowing from the severity of the sanction is that a court must give at least the party's attorney notice and an opportunity to respond before entering a default judgment (or dismissing the case), but there need not be repeated warnings formalized in writing. *See, e.g., Ball v. City of Chicago*, 2 F.3d 752, 755 (7th Cir. 1993) ("'Due warning' need not be repeated warnings and need not be formalized in a rule to show cause. A judge is not obliged to treat lawyers like children. But there should be an explicit warning in every case."); *Halas v. Consumer Servs., Inc.*, 16 F.3d 161, 164 (7th Cir. 1994) ("a formal, written order to comply with discovery is not required under Rule 37(b); an oral directive from the district court provides a sufficient basis ... if it unequivocally directs the party to provide the requested discovery"). Moreover, despite the severity of the sanction, a court is not required to issue less severe

sanctions before deciding to enter default judgment (or to dismiss the case). *See Patterson v. Coca-Cola Bottling Co.*, 852 F.2d 280, 284 (7th Cir. 1988) ("a district court is not required to fire a warning shot").

In arguing deficient notice, Sharif relies in part on the requirement that in a motion to compel disclosure or discovery the moving party "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Fed. R. Civ. P. 37(a). We are unable to see how Rule 37(a) supports Sharif's argument. Sharif's responses to WIN's discovery requests were due on March 15, 2010, but Sharif ignored those requests. On April 13, WIN's counsel conferred with Sharif's counsel and requested complete responses to discovery requests by April 23. Sharif's counsel would not agree to WIN's request, so on April 15 WIN filed its motions to compel and for sanctions in the bankruptcy court. Accordingly, WIN satisfied its Rule 37(a) obligation to confer in good faith with Sharif prior to filing its motion to compel with the bankruptcy court.

Sharif also maintains that he was not given proper notice that his production was deficient and that WIN made no demands and identified no deficiencies between April 28 and the evidentiary hearing on May 24. On April 21, the bankruptcy court granted the motion to compel and continued the motion for sanctions. In its order, the court expressly stated that an order of default would be

entered if Sharif did not comply with the discovery requests by April 28 (approximately six weeks after the original due date). *Cf. In re Thomas Consol.*, 456 F.3d at 727 (warning was sufficient where district court warned trustee's lawyer that case would "never get to a trial" if he continued failing to comply with orders). After five years of Sharif refusing to produce requested documents (including, of course, the prior litigation), on April 27 he produced approximately 1,500 pages of documents. But his response fell woefully short of the discovery that WIN had requested. As set forth earlier in this opinion, Sharif failed to produce any documents on several matters that were the focus of WIN's requests. He failed to produce documents related to the Loan Assets, documents concerning several accounts in which he had an interest, documents concerning business ventures with which he had claimed to be involved, his signed federal and state tax returns, source documents used to prepare his tax returns, and documents related to the $271,000 he allegedly owed his family. Perhaps most importantly, he failed to produce any documents concerning the formation and funding of the Soad Wattar Trust. Additionally, much of the discovery that he tendered was deficient—for example, he failed to verify and/or sign his interrogatory responses, and instead of producing bank statements and other records related to his bank accounts he provided the names and addresses of the banks with corresponding account numbers. *Cf.* Fed. R. Civ. P. 37(a)(4) ("an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond"); *In re Thomas Consol. Indus.*, 456 F.3d at 725. During his

deposition on May 13, Sharif admitted many of these deficiencies, including his failure to produce any documentation concerning the creation and funding of the Soad Wattar Trust. On May 20, Sharif tendered supplemental discovery, which did not address the deficiencies. Then on May 24, the bankruptcy court held a hearing to determine whether Sharif had complied with the court's order compelling discovery.

Sharif had notice and he had an opportunity to be heard (he failed to show up for the May 24 hearing, but he was represented by counsel and he does not claim that the court prevented him from attending). This is *not* a case where the question of compliance is a close call. We agree with both the bankruptcy court and the district court that a phone call to Sharif's counsel "would have been futile" in light of the gross deficiencies in Sharif's responses to WIN's discovery requests, not to mention the then-five-year pattern of Sharif engaging in dilatory tactics to avoid his obligations to WIN. Sharif was provided ample notice that WIN sought discovery of his and the Soad Wattar Trust's finances. He also had notice that if he failed to respond WIN would seek sanctions, including default judgment. The bankruptcy court then expressly informed Sharif (at least, Sharif's counsel, which is all that was required) that failure to comply with the discovery requests would result in default. The bankruptcy court, rather than issuing default merely on WIN's say so at the May 24 hearing, conducted its own, independent analysis. This case is thus far afield from *Kruger v. Apfel*, 214 F.3d 784, 787-88 (7th Cir.

2000) (per curiam), relied upon by Sharif, in which we reversed a sanction of dismissal where there had been one mistake (a missed filing deadline) and the only "notice" had been a magistrate's recommendation of dismissal, which the district court had accepted without review, *id.* at 786. The fact that the bankruptcy court did not afford Sharif more bites at the apple does not mean that his due process rights to notice and opportunity to be heard were violated.

We also conclude that the bankruptcy court's implied finding of willfulness, bad faith, or fault was not clearly erroneous and that it did not abuse its discretion in imposing the severe sanction of default. Sharif does not dispute that the discovery responses tendered on April 27 were deficient—he admitted most of those insufficiencies at his deposition. Yet he appears to claim that the supplemental discovery he tendered on May 20 and the materials he submitted in his June 22 motion for summary judgment placed him in substantial compliance. We decline to consider the materials he presented after the bankruptcy court's deadline of April 28 passed. We also note that when he made the same argument before the bankruptcy court he failed to specify the documents produced after the deadline, the information contained therein, whether they were responsive to WIN's requests, and why they had not been produced sooner. His failure to develop his argument below waives it on appeal. *See, e.g., Williams v. Dieball*, No. 12-3348, 2013 WL 3942932, at *3-4 (7th Cir. Aug. 1, 2013). Considering only the discovery that Sharif tendered before the April 28

deadline, there is clear and convincing evidence that Sharif's noncompliance with the discovery order was willful and in bad faith. The evidence of bad faith becomes overwhelming once Sharif's history of dilatory and feckless tactics is taken into account. *Cf. Smith v. Smith*, 145 F.3d 335, 344 (5th Cir. 1998) ("In making its 'bad faith' determination, the district court was entitled to rely on its complete understanding of the parties' motivations. Defendants present no authority for the proposition that the district court is prevented from considering a party's actions in a related case in making its bad faith determination under Fed. R. Civ. P. 37. Moreover, the dilatory and obstructive conduct of the defendants has been well-documented and the extreme sanction of default judgment was warranted by their actions." (internal citations omitted)).

In many respects this case is similar to *Golant*, in which we upheld a bankruptcy court's entry of default judgment as a discovery sanction, where the court had repeatedly ordered Golant to comply with discovery requests and he had failed to do so; Golant had admitted failing to produce numerous documents; and Golant had produced a fair number of documents in response to the discovery requests but had failed to produce "many important documents." *In re Golant*, 239 F.3d at 936-37. Entry of default judgment, we concluded, was the only adequate sanction, reasoning that "[w]here a debtor in bankruptcy refuses to be completely forthright with information regarding his financial dealings and resources—information that is of paramount importance to an efficient and fair

bankruptcy proceeding— the bankruptcy court is left with little recourse but to enter default judgment against the debtor," *id.* at 937. As in *Golant*, the bankruptcy court here did not abuse its discretion in imposing the sanction of default judgment. *See also In re Kilgus*, 811 F.2d at 1118 ("Judges must be able to enforce deadlines. Doing so means the use of sanctions, even severe ones such as default, when parties ignore the ongoing proceedings and demand the right to set their own deadlines. The entry of defaults may be especially important in bankruptcy cases, which may involve hundreds or thousands of parties.").

B. Attorney's Fees

The district court entered two separate orders against Sharif awarding WIN attorney's fees and costs. Sharif has appealed both, but he made no argument in his opening brief as to why the fee awards are erroneous, so WIN contends that he has waived any claims concerning them. Sharif responds that reversal of the fee awards is the "natural corollary" to reversal of the sanction of default judgment.

Sharif's failure to develop an argument in his opening brief has waived any claim he may have to the propriety of awarding fees and costs in the first place. We have concluded that the bankruptcy court did not abuse its discretion in entering default judgment as a discovery sanction on the first four counts of the complaint, so the "natural corollary" is that the fee awards should be upheld unless there is

an independent reason that they are improper. Even in his reply brief Sharif fails to identify an independent basis as to why the fee awards should not be upheld if the sanction of default is upheld.

Nevertheless, we agree that a remand to the bankruptcy court is necessary for a recalculation of the fee awards. The bankruptcy court premised its calculations on WIN having successfully obtained a default judgment on all five counts of the adversary complaint. But the court had constitutional authority to enter judgment on only four of those counts. It seems eminently reasonable that the fee awards should be adjusted to reflect that fact. We therefore direct the district court to remand the fee awards to the bankruptcy court for a recalculation of each.

V. Conclusion

In sum, the portion of the district court's judgment affirming the bankruptcy court's entry of default judgment denying discharge of Sharif's debts is AFFIRMED. The portion of the district court's judgment affirming the bankruptcy court's entry of default judgment on WIN's alter-ego claim is REVERSED, the bankruptcy court's judgment on the alter-ego claim is VACATED, and the case is REMANDED to the district court for further proceedings consistent with the instructions set forth in this opinion. Lastly, the district court's judgment affirming the bankruptcy court's two fee awards is REVERSED and REMANDED to the district court with instructions to remand the orders to the bankruptcy court for recalculation.

Appendix B

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 7, 2013

Before

JOEL M. FLAUM, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*
JOHN DANIEL TINDER, *Circuit Judge*

No. 12-1349

WELLNESS INTERNATIONAL NETWORK, LIMITED, RALPH OATS and CATHY OATS,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Plaintiffs-Appellees,	
v.	No. 1:10-cv-05303
RICHARD SHARIF,	Harry D. Leinenweber, *Judge.*
Defendant-Appellant.	

ORDER

On consideration of the petition for rehearing and/or rehearing en banc, filed on September 18, 2013, no judge in active service has requested a vote,

and all of the judges on the original panel have voted to DENY the petition for rehearing.

Accordingly, the petition for rehearing is DENIED.

Appendix C

United States District Court,

N.D. Illinois,

Eastern Division.

Ragda SHARIFEH, Movant,

v.

Horace FOX, Jr., Defendant.

Richard Sharif, Appellant,

v.

Wellness International Network Ltd., Ralph Oats and Cathy Oats, Defendants.

Nos. 11 C 8811, 09 BK 05868, 09–AP–00770, 10–AP–02239, 10 C 5303, 10 C 5333, 10 C 6057, 11 C 175.

Feb. 10, 2012.

MEMORANDUM OPINION AND ORDER

HARRY D. LEINENWEBER, District Judge.

This case concerns four appeals stemming from a bankruptcy filing by Richard Sharif ("Sharif") and an adversary proceeding filed by his creditor, Wellness International Network, Ltd. ("Wellness"). After Sharif failed to respond to certain discovery requests, the Bankruptcy Court refused to discharge Sharif's debt to Wellness, entered a default against him in the adversary proceeding, and ordered him to pay certain fines and fees. Pending before the Court are

Sharif's appeal of those rulings, as well as his sister Ragda Sharifeh's efforts to withdraw the reference to the Bankruptcy Court. Because all the appeals raise the same issues, the Court will decide them jointly. For the reasons stated, the motion to withdraw the reference is denied, and this Court affirms the Bankruptcy Court's rulings in their entirety.

I. BACKGROUND

This case has its roots in a dispute litigated in the United States District Court for the Northern District of Texas. In 2005, Appellant Richard Sharif (hereinafter, "Sharif") and others brought suit against Wellness International Network, Ltd. and Ralph and Cathy Oats (collectively, "Wellness"), alleging fraud and violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). When Sharif failed to participate in discovery, the district court granted summary judgment to Wellness, a ruling that was affirmed by the Fifth Circuit Court of Appeals. In a brief ruling, the appeals court found:

> A review of the record on appeal demonstrates that Appellants' untimely performance in this court mirrors a lengthy history in the district court of dilatoriness and hollow posturing interspersed with periods of non-performance or insubstantial performance by Appellants and their counsel, leaving the unmistakable impression that they have no purpose other than to prolong this contumacious litigation for purposes of harassment or delay, or both.

> The time is long overdue to terminate Appellants' feckless litigation....

Sharif v. Wellness Int'l Network, Ltd., 273 Fed. App'x 316, 317 (5th Cir. 2008). On remand, the district court ordered Sharif to pay Wellness $655,596 in attorney fees. *See Sharif v. Wellness Int'l Network, Ltd.*, No 3:05–CV–01367–B, 2008 WL 5220526 (S.D.Tex. Dec. 12, 2008). Wellness attempted to collect those fees, in part by serving Sharif with discovery requests seeking information related to his assets. Sharif refused to respond to discovery and failed to appear for his deposition. He was held in contempt, arrested, and subsequently released on his own recognizance with a promise to respond to the post-judgment discovery. Sharif never responded, and filed for bankruptcy in the Northern District of Illinois.

A. The Bankruptcy Proceeding

Sharif's bankruptcy petition listed Wellness as a creditor, and Wellness filed a proof of claim. Wellness then obtained, through it own efforts, a loan application Sharif had submitted to Washington Mutual Bank, dated June 14, 2002, in which he admitted that he owned: (1) three businesses valued at $2.4 million; (2) three pieces of property valued at $1.4 million; (3) a retirement account valued at $1.4 million; and (4) three bank accounts with $180,000 in cash (the "Loan Application Assets"). Washington Mutual approved the loan based on these representations. Sharif never produced documents relating to these assets in the Texas litigation.

On March 25, 2009, the parties held the initial Section 341 creditors' meeting. Wellness requested that Sharif provide documentation related to the Loan Application Assets, and the meeting was continued until April 21, 2009, to allow him to do so. At that time, Sharif failed to provide any documents related to those assets. Instead, he said he had lied on the loan application, and he did not own any of the assets. Rather, he said, they were owned by the Soad Wattar Living Trust, of which he claimed to be the trustee. (Soad Wattar, now deceased, was Sharif's mother.) Wellness requested that Sharif produce documents evidencing the formation and funding of the trust. The creditors' meeting was continued until June 3, 2009. Sharif failed to provide the requested documents and unsuccessfully sought a protective order requesting that he not have to turn over that information.

On October 20, 2009, due to Sharif's failure to produce the requested documents, the Bankruptcy Trustee filed a Motion for Turnover of the property of the estate, which the Bankruptcy Court granted pursuant to 11 U.S.C. §§ 521(3) and 542(a). Among other things, the Bankruptcy Court ordered Sharif to turn over documentation related to the trust. Sharif failed to comply with this order.

B. The Adversary Proceeding

On August 24, 2009, after Sharif failed to provide documents related to the Soad Wattar Trust, Wellness filed an adversary proceeding against Sharif, individually and as trustee of the trust. The Adversary Complaint objected to the discharge of

Sharif's debt pursuant to 11 U.S.C. §§727(a)(2), (3), (4) and (5). Essentially, the Complaint accused Sharif of hiding assets, and sought a declaratory judgment that the Soad Wattar Trust was Sharif's alter ego.

Sharif was to respond to Wellness's discovery requests by March 15, 2010, and his deposition was noticed for March 24, 2010. On March 12, 2010, almost a month after being served with discovery, Sharif's counsel requested an extension of time to complete discovery. Sharif's counsel said he believed Sharif had traveled to Syria.

On March 24, 2010, Sharif filed a motion to postpone his deposition and delay his discovery responses. Sharif did not appear at his deposition. On April 7, 2010, the Bankruptcy Court denied that motion. On April 13, Wellness's counsel conferred with Sharif's counsel to resolve the dispute over the discovery responses. Wellness wanted Sharif to respond to the discovery requests by April 23, 2010, but Sharif's counsel could not agree to that because he did not know when Sharif would return to this country.

Wellness responded by filing a Motion to Compel, which was granted by the Bankruptcy Court on April 21, 2010. The Bankruptcy Court ordered Sharif to respond to all outstanding discovery requests by April 28, 2010. The Bankruptcy Court warned that if he did not do so, an Order of Default would be entered against him. On April 27, 2010, Sharif produced about 1,500 pages of discovery. On May 13, 2010, Sharif sat for his deposition. Unsatisfied with

his answers, Wellness supplemented its Motion to compel with his deposition testimony. At a hearing on May 24, 2010, counsel for Wellness identified several categories of documents that Sharif had failed to produce, including: (1) documents related to the Richard Sharif Trust, which was listed on his Bankruptcy Petition; (2) documents relating to accounts at A.G. Edwards in Sharif's name; (3) documents relating to certain bank accounts at Banco Popular, J.P. Morgan Chase, and Wells Fargo that Sharif owned or to which he had access; (4) documents related to the formation and founding of the Soad Wattar Trust; and (5) documents showing the disposition of the Loan Application Assets. Following a lengthy recitation of these various deficiencies by counsel for Wellness, Sharif's counsel said that Sharif had made a good faith effort to comply with the discovery requests. He said that Sharif was unable to meet the deadlines because he was in Syria with his dying mother, and produced proof of the Syria trip. Sharif's counsel objected that counsel for Wellness had not consulted with him before supplementing its motion to compel and moving for default. Sharif did not attend this hearing.

After the evidentiary hearing, the Bankruptcy Court issued a ruling granting Wellness's motion to compel on July 6, 2010. The Bankruptcy Court found that Sharif was prohibited from opposing Wellness' claims in the adversary proceeding, struck his answer to the adversary complaint, and entered a default judgment in favor of Wellness. The Court also denied Sharif a discharge pursuant to 11 U.S.C.

§ 727(a)(2)-(a)(6). This order was entered both in the adversary proceeding and the bankruptcy proceeding.

In its ruling, the Bankruptcy Court outlined various failings by Sharif in connection with his discovery obligations, including his failure to sign or verify certain discovery responses and his continuous failure to provide documents requested by Wellness and the bankruptcy trustee. The Bankruptcy Court then outlined several categories in which Sharif was deficient. Specifically, Sharif failed to produce: (1) documents related to the Washington Mutual Loan Application and the assets listed therein; (2) documents related to the Richard Sharif Revocable Trust that he listed in his sworn bankruptcy schedule; (3) certain bank statements and financial records; (4) records showing the disposition of certain assets in which he once claimed an interest; (5) records showing the formation and funding of the Soad Wattar Trust; (6) signed tax returns; and (7) documents evidencing alleged debts to family members.

The Bankruptcy Court found that Sharif had not made a "serious effort" to comply with the discovery requests either before or after his mother's death. The Bankruptcy Court further found that counsel for Wellness had met its obligation under Local Rule 37.2 to consult with counsel for Sharif before filing the initial motion to compel. The court noted that while Sharif's counsel asserted that additional documents had been turned over following the deposition, those documents were still produced after the April 28, 2010 deadline. Nor did counsel for

Sharif explain what the documents contained, why they were not produced sooner, or whether they were responsive to Wellness' requests.

The Bankruptcy Court concluded by noting, "This court has stated time and time again that Bankruptcy Courts provide extraordinary relief that requires extraordinary cooperation." Because Sharif had failed to comply with most of Wellness' discovery requests, and because the lack of compliance was part of a pattern dating back to the underlying litigation in Texas, the court granted the motion to compel.

Subsequently, on August 9, 2010, the Bankruptcy Court awarded attorneys' fees and costs to Wellness in connection with the motion for sanctions in the amount of $54,405.99, and $8,349.75, respectively. On November 18, 2010, the Court entered an order granting Wellness fees and costs in connection with the 341 creditors' meeting.

Sharif appealed all of these orders. Initially, three of the appeals were pending before Judge James B. Zagel, but this Court granted the parties' joint motion to consolidate all the appeals before this Court, which had been assigned the appeal with the lowest case number.

Sharif argues: (1) that he was deprived of due process when Wellness failed to confer with his counsel about obtaining discovery, or to otherwise specify any particular deficiency prior to the hearing on the sanctions; and (2) that the Bankruptcy Court abused its discretion in declaring a default, denying

discharge, and finding that the Soad Wattar Trust was the property of the bankruptcy estate.

C. Ragda Sharifeh's Involvement

Before the Court can decide these appeals, however, it must deal with a separate challenge from Sharif's sister, Ragda Sharifeh ("Sharifeh"). Sharifeh contends that she is the beneficiary of the Soad Wattar Trust. After learning that the Bankruptcy Court had found the Trust to be the alter ego of her brother, she filed suit in Cook County Circuit Court and an adversary proceeding in the Bankruptcy Court. Her adversary Complaint alleged that the Bankruptcy Trustee, Horace Fox. Jr., had wrongfully converted the assets of the Soad Wattar Trust and sought a declaration that she was the beneficiary of the trust. The Bankruptcy Court subsequently dismissed this Complaint on numerous grounds, including that her claims were barred because of the Court's previous order defaulting Sharif on Wellness's adversary complaint. In that order, the Bankruptcy Court noted that Sharifeh had given deposition testimony to the effect that Sharif had been her agent in conducting the Texas litigation. She also testified that she knew Sharif had claimed to own the Loan Application Assets, and that she told him to make that claim in order to secure a loan for her mother.

Sharifeh is appealing the ruling dismissing her adversary complaint, and her appeal is pending before Judge John F. Grady in Case No. 11 C 7374. In the meantime, she also has filed a Motion to Withdraw the Reference that has been assigned to

this Court. In that Motion, she asks this Court to find that under *Stern v. Marshall*, —— U.S. ——, 131 S. Ct. 2594, 180 L.Ed.2d 475 (2011), the Bankruptcy Court did not have jurisdiction to enter final judgments either in Wellness' adversary proceeding, 09–AP–770, or her own, 10–AP–2239.

II. MOTION TO WITHDRAW REFERENCE

As a preliminary point, the Court notes that Sharifeh was not a party to the Wellness adversary proceeding, and does not explain how she has standing to seek the withdrawal of a reference in a proceeding to which she was not a party. That aside, her Motion to Withdraw the References, after final orders have been issued, is untimely and unmeritorious.

A. Legal Standard

Bankruptcy cases are automatically referred to bankruptcy judges for the same federal district pursuant to 28 U.S.C. § 157(a). *Southern Elec. Coil, LLC v. FirstMerit Bank, N.A.*, No. 11 C 6135, 2011 WL 6318963, at *2 (N.D. Ill. Dec. 16, 2011) (citing *In re Vicars Ins. Agency, Inc.*, 96 F.3d 949, 951 (7th Cir. 1996)). A bankruptcy court may hear "core" proceedings and enter final judgment pursuant 28 U.S.C. § 157(b)(1)-(2). *Southern Elec. Coil*, 2011 WL 6318963, at *2. By contrast, a bankruptcy court may hear non-core proceedings that are "otherwise related to a case under Title 11," but may only submit proposed findings of facts and conclusions of law to the district court. *Id.*; see 28 U.S.C. § 157(c)(1). The district court then reviews *de novo* those

findings to which a party objects, and enters a final judgment. *Id.*

Among the core proceedings that a bankruptcy judge may determine are proceedings to "determine, avoid, or recover fraudulent conveyances." 28 U.S.C. § 157(b)(2)(H). Although not styled as such in Wellness' Adversary Complaint, Sharifeh argues that this is the type of adversary claim that Wellness brought against Sharif.

Sharifeh contends that in *Stern*, the U.S. Supreme Court cast severe doubt on the continuing ability of Bankruptcy Courts to rule on this type of claim. She contends that in light of *Stern*, the Bankruptcy Court did not have the authority to enter final orders in either adversary proceeding. As such, she moves to withdraw the reference in both adversary proceedings pursuant to 28 U.S.C. § 157(d), which allows a district court to withdraw, in whole or in part, any case referred to the bankruptcy court "on timely motion of a party, for cause shown."

B. Analysis

In *Stern*, a case involving the marital exploits of the late Anna Nicole Smith ("Anna Nicole"), her stepson E. Pierce Marshall ("Pierce") filed a defamation claim and proof of claim in Anna Nicole's bankruptcy proceeding. *Stern*, 131 S. Ct. at 2601. He alleged that Anna Nicole defamed him by falsely accusing him of fraudulently gaining control of his late father's assets and preventing his father from leaving property to Anna Nicole, his much younger wife. *Id.*

Anna Nicole responded by filing a counterclaim for tortious interference with the gift she expected to receive from her husband. *Id.* Counterclaims by the bankruptcy estate against people filing claims against it were also considered core proceedings by statute, *see* 28 U.S.C. § 157(b)(2)(c), but the Supreme Court nonetheless found that this type of claim was a state law action independent of the federal bankruptcy laws that could only be heard by Article III judges. *Stern*, 131 S. Ct. at 2610–11.

In the wake of *Stern*, some courts have questioned whether bankruptcy courts constitutionally may rule upon fraudulent conveyance claims. *See In re Canopy Fin., Inc.*, No. 11 C 5360, 2011 WL 3911082, at *3 (N.D. Ill. Sept. 1, 2011) (finding that *Stern* made it clear that bankruptcy courts lack authority to enter final judgment on fraudulent conveyance claims); *In re The Mortgage Store, Inc.*, No. 11–00439 JMS/RLP, 2011 WL 5056990, at *3–4 (recounting split in case law over whether bankruptcy courts may still enter final judgment on such claims).

While interesting, the Court need not enter this fray. Sharifeh gives no explanation as to her failure to raise a *Stern* objection prior to this late date, when both her appeal and that of her brother are pending. Nor did Sharif himself at any time raise this issue. Although *Stern* was decided after the final orders were issued in Sharif's case, it predated by two months the Bankruptcy Court's ruling dismissing Sharifeh's own adversary complaint.

Sharifeh treats her objection as one of subject matter jurisdiction, which can be raised at any time. However, that was not the basis for the ruling in *Stern*. *See In re U.S. Digital*, 461 B.R. 276, 2011 WL 6382551, at *1 (Bankr. Del. Dec. 20, 2011) ("*Stern* in no way limits the bounds of a bankruptcy court's subject matter jurisdiction."); *see also Stern*, 131 S. Ct. at 2607 (noting that the statute at issue, 28 U.S.C. § 157, allocates authority between the district court and bankruptcy court, but that allocation "does not implicate questions of subject matter jurisdiction.").

Indeed, *Stern* itself contains language indicating that objections based on a bankruptcy court's authority to enter a final judgment are waivable. As an alternative argument, Pierce contended that the bankruptcy court did not have jurisdiction to enter judgment on his defamation claim because it was a personal injury case that, by statute, had to be tried in the district court. *Stern*, 131 S. Ct. at 2606; *see* 28 U.S.C. § 157(b)(5). Rejecting that argument, the high court noted that the stepson had consented to the bankruptcy court's resolution of his defamation claim for more than two years, waiving any objection on that basis. *Stern*, 131 S. Ct. at 2606–07. The Court added, "We have recognized 'the value of waiver and forfeiture rules' in 'complex' cases, and this case is no exception.' If Pierce believed that the Bankruptcy Court lacked the authority to decide his claim for defamation, he should have said so—and said so promptly." *Id.* at 2608 (internal citations omitted).

The same is true here. If Sharifeh believed that the Bankruptcy Court lacked authority to decide her

claims, she should have raised the issue well prior to now. *See In re Wilderness Crossing*, No. 09–14547, 2011 WL 5417098, at *1 (Bankr. W.D. Mich. Nov. 8, 2011) (holding that parties may waive *Stern*-based objections). It is far too late now, and smacks of a delay tactic in litigation that dragged on for too long. *See In re Mandalay Shores Co-op. Housing Ass'n Inc.*, 58 B.R. 586, 587 (N.D. Ill. 1986) ("Although the Bankruptcy Code does not specify when a motion to withdraw reference must be filed, common sense dictates that it must precede dismissal of the bankruptcy proceedings.").

None of these conclusions is upended by the late-arising cases cited in Sharifeh's reply. *See In re Ortiz*, 665 F.3d 906, 2011 WL 6880651, at *7 (7th Cir. Dec. 30, 2011) (noting "This case does not present any question about a bankruptcy judge's authority to enter a final judgment when the parties have consented."); *see also In re Republic Windows & Doors, LLC v. Levey*, No. 08–34112, 2011 WL 6157342 (Bankr. N.D .Ill. Dec. 12, 2011) (concluding that "Contrary to the Defendant's broad reading of *Stern*, that decision does not implicate subject matter jurisdiction.")

But Sharifeh further contends in her reply that her jurisdictional waiver was not truly voluntary; that she tried to have the matter adjudicated in Cook County Chancery Court. Sharifeh abandoned that effort after the bankruptcy judge, Judge Cox, upon hearing of the Chancery Court action, called it an effort to "spirit away assets" and announced she would ask the U.S. Attorney's Office to investigate. Sharifeh's abandonment of the state court case was

done solely "out of fear that her actions ... would result in criminal charges being brought against her." Pet'r's Reply 5.

While that might plausibly demonstrate why Sharifeh moved her efforts to bankruptcy court, it does not explain why she never contested the bankruptcy court's jurisdiction once she got there. Her vigorous efforts there belie any claim of timidity toward the bankruptcy judge. Sharifeh herself admits that, even after the judge's comments, Sharifeh filed an adversary complaint, a motion to intervene and a motion to vacate an order of that same bankruptcy judge. *Id.* She also filed a motion asking Judge Cox to recuse herself over the comment, and then an appeal when that motion was denied. *See In re: Richard Sharif*, No. 11–438, (N.D. Ill. March 3, 2011) (denying recusal appeal and finding nothing improper about Judge Cox's comments).

Simply put, a litigant unafraid to ask a judge to recuse herself would not be afraid to file a motion contesting that court's jurisdiction. The Court finds that waiver, not fear, was behind Sharifeh's failure to raise this issue before now.

For these reasons, Sharifeh's Motion to Withdraw Reference is denied.

III. SHARIF APPEAL

A. Standard of Review

The Court reviews the Bankruptcy Court's entry of sanctions for abuse of discretion, and its findings of fact for clear error. *In re Thomas Consol. Indust., Inc.*, 456 F.3d 719, 724 (7th Cir. 2006).

Federal Rule of Civil Procedure 37 is applicable to adversary proceedings in bankruptcy through Rule 7037 of the Bankruptcy Rules. *Id.* at 724 n. 4. Rule 37(a) allows courts to enter orders compelling parties to comply with discovery, and Rule 37(b) provides that a failure to obey such an order may justify certain sanctions, including a default judgment against the delinquent party. When imposing the sanction of a default judgment or dismissal of a case under Rule 37(b), the court must find that the delinquent party displayed willfulness, bad faith, or fault. *Id.* (citing *Maynard v. Nygren*, 332 F.3d 462, 467 (7th Cir.2003)). Such a finding should be explicit, but may be implied from the sanction order. *Id.* (citing *Golant v. Levy*, 239 F.3d 931, 937 (7th Cir. 2001)).

B. Analysis

As a preliminary matter, much of the evidence that Sharif points to here about the Soad Wattar Trust comes not from evidence presented at the hearing on the motion for sanctions, but from a Motion for Summary Judgment on Wellness' adversary complaint submitted to the Bankruptcy Court on June 22, 2010. The motion was denied as moot due to the court's ruling on Wellness' motion for sanctions. Wellness asks this Court not to consider

the information in the summary judgment motion, given that it was not presented to the Bankruptcy Court as part of its consideration of the discovery dispute. Ultimately it does not matter. Even considering the contents of the motion, Sharif cannot prevail because the Court will not attach to it the significance that Sharif would like.

When considering the appropriateness of sanctions, this Court is to "look at the entire procedural history of the case." *Rice v. City of Chi.*, 333 F.3d 780, 784 (7th Cir. 2003) (internal citations omitted). Among the factors to consider are the frequency and magnitude of the non-compliance, the party's failure to comply with court deadlines, the effect of these failures on the court's time and schedule, prejudice to other litigations, and the possible merits of the suit. *Id.* (citing *Williams v. Chicago Bd. of Educ.*, 155 F.3d 853, 857 (7th Cir. 1998)).

The summary judgment motion contends that Sharif and Sharifeh had produced documents or sworn testimony to show that he never had an interest in the Loan Application assets, and that the Soad Wattar Trust was funded with money Wattar received as a result of her husband's death. Sharifeh, according to the motion, became the successor beneficiary of the Soad Wattar Trust on October 8, 2007. Sharif contended that he never received funds from the Soad Wattar Trust, nor received any compensation for acting as its trustee. He claims he lied on the Washington Mutual loan application in order to help his mother purchase a home.

The motion for summary judgment also includes a declaration from an accountant, Thomas Snaza ("Snaza"), who prepared the tax returns for both the trust and Sharif personally. Snaza declared that over the past six years, he had not discovered any transactions in which Sharif used the assets of the trust for his own benefit or any evidence that Sharif had received financial compensation for acting as trustee of the trust. Upon Soad Wattar's death, according to the summary judgment motion, Sharifeh became the successor beneficiary to the trust. She also claims that she became the successor trustee, replacing Sharif.

Sharif argues that the summary judgment motion, and its accompanying affidavits, are important to show that the merits of Wellness' claim were weak. However, the Court notes that Wellness did not have an opportunity to respond to the motion or challenge the evidence brought forward. Sharif cannot reasonably expect this Court to accept his version of events, particularly as to the ownership of the Soad Wattar Trust, when he was defaulted for failing to provide discovery on this very matter.

Nor do the contents of the motion show that Sharif substantially complied with his discovery obligations, much less by the date ordered by the Bankruptcy Court, which was April 28, 2010, nearly two months prior to the filing of the motion for summary judgment on June 22, 2010. So it does not provide a basis for reversing the Bankruptcy Court's rulings.

1. Whether Sharif was Denied Due Process

Sharif argues that the failure of Wellness' attorneys to consult with his lawyer before supplementing its motion to compel amounted to a violation of his due process rights because he was not on notice of what he had to do to avoid the sanction of default. Presumably, Sharif means that the Bankruptcy Court, and not Wellness, violated his right to due process when it granted the motion to compel although the parties had not conferred after Wellness supplemented its motion. It is true that the imposition of sanctions under Rule 37 must follow notice and the opportunity to respond. *See Rothman v. Emory Univ.*, 123 F.3d 446, 455 (7th Cir. 1997). Here, however, Sharif received both.

Contrary to Sharif's argument that he had no notice that the Bankruptcy Court might impose drastic sanctions, the Court explicitly informed him in its April 21, 2010, order that "in the event Richard Sharif fails to comply by April 28, 2010, an order of default will be entered against him in the proceeding." Further, the Bankruptcy Court held a lengthy hearing on May 24, 2010, on the alleged violations, which Sharif did not attend. At that hearing, counsel for Sharif was given an opportunity to explain his failure to comply with his discovery obligations. To the extent he argues that Rule 37 required more of the Bankruptcy Court or Wellness, Sharif is mistaken.

Rule 37(a) requires a party to certify that it has in good faith conferred or attempted to confer with the party failing to provide discovery before filing a

motion to compel. However, there is no dispute that Wellness' counsel conferred with Sharif's prior to filing the motion to compel. Sharif cites no authority for the proposition that Wellness had a duty to again confer before supplementing its motion. Additionally, Wellness supplemented its motion with testimony from Sharif's deposition, which he and his counsel attended. So Wellness' complaints cannot have come as a surprise to Sharif.

The Bankruptcy Court specifically addressed this issue and found that an additional certification was not required. This Court concurs. In particular, the Bankruptcy Court noted, "[A] phone call would have been futile because the Debtor was so grossly out of compliance with his discovery obligations." This is especially true given the history of this dispute, dating back to the Texas litigation. Sharif has shown, time and time again, an unwillingness to turn over information that would allow Wellness to collect its judgment against him. There is no reason to think an additional phone call from Wellness' counsel would have solved the problem.

2. Whether the Bankruptcy Court Abused its Discretion

Sharif points to several supposed flaws with the Bankruptcy Court's order, none of which justify reversal. First, he contends that the Bankruptcy Court did not provide any insight into the deficiencies in Sharif's discovery responses.

This is not so. As detailed above, the 18–page order outlines numerous deficiencies in some detail. Nor can the Court accept Sharif's argument that he

made a good-faith effort to comply with discovery. It is true that Sharif delivered some 1,500 pages of documents to counsel for Wellness prior to the deposition. Yet it is clear, based on Sharif's own deposition, that he failed to turn over numerous categories of documents.

A few examples will suffice. Sharif admitted that he had not provided any documents evidencing the source and funding of the Soad Wattar Trust. Sharif Dep. at 109:11–110:24. Sharif admitted that he did not provide the source data and documents used to complete his tax returns. *Id.* at 133:24–136:2. He admitted that he did not provide signed copies of his tax returns. *Id.* at 130:2–131:6. He admitted to not having provided information about various accounts, including the Soad Wattar Living Trust Account at Banco Popular. *Id.* at 107:5–108:1.

Additionally, although Sharif produced documents following the deposition, apparently including bank statements relating to the Soad Wattar Trust and Sharif's personal accounts, it is not clear (and Sharif has made no effort to make it clear) exactly what was produced, much less whether this brought Sharif anywhere near compliance with the discovery requests. As such, despite Sharif's arguments, the Court cannot find that he substantially complied with the discovery requests.

Nor did the Bankruptcy Court err in finding that Sharif acted willfully and in bad faith. While the court did not expressly use these terms that is the clear implication of its findings that Sharif had not made a serious effort to comply with the discovery

requests, either before or after his mother's death, that he was grossly out of compliance with his obligations, and that his lack of compliance was part of a pattern that had continued from the time of the Texas litigation. *See Smith v. Smith*, 145 F.3d 335, 344 (5th Cir. 1998) (holding that in imposing sanctions court may consider a party's actions in a related case).

Finally, Sharif argues that the Bankruptcy Court abused its discretion in seizing the Soad Wattar trust and turning it over to the bankruptcy trustee to pay his debts. In so arguing, he insists that the Soad Wattar Trust is a real trust, with a real beneficiary—his sister, Sharifeh. Even if this is true, however, the Court notes that Sharifeh brought her own appeal to the Bankruptcy Court's order dismissing her adversary proceeding in which she sought to be pronounced the rightful owner of the assets in the Soad Wattar Trust. That case is pending before Judge Grady, and this Court will not comment on its merits.

IV. SHARIF MOTION TO SUPPLEMENT BRIEFING SCHEDULE

Lastly, Sharif moved on January 12, 2012 to file supplemental briefings in the 10 C 5303 appeal based on the Seventh Circuit's December 30, 2011 ruling in *In Re Ortiz.*, 665 F.3d 906, 2011 WL 6880651 (7th Cir.). Sharif seeks to argue, as his sister did, that the bankruptcy court was without jurisdiction. Sharif pegs his motion to the recent *Ortiz* ruling, but the issue dealt with stems from *Stern v. Marshall* (*See Infra* II. B., discussing *Stern*

and *Ortiz*). Stern was decided by the United States Supreme Court on June 23, 2011, a month and a half before Sharif filed his appellate brief on August 9, 2011 in this case. Sharif now seeks to raise this issue, for the first time, six months after Stern. The court finds this motion untimely, and therefore denies it.

V. CONCLUSION

For the reasons stated herein, the Court rules as follows:

1. Ragda Sharifeh's Motion to Withdraw Reference, brought in Case No. 11 C 8811 is denied.

2. Richard Sharif's Motion to Set Supplemental Briefing Schedule, brought in Case No. 10 C 5303 is denied.

3. The rulings of the Bankruptcy Court in the appeals in Case Nos. 10 C 5303, 10 C 5333, 10 C 6057, and 11 C 175 are affirmed in their entirety.

IT IS SO ORDERED.

Appendix D

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 7
	)	
Richard Sharif,	)	Case No. 09 B 05868
	)	
Debtor.	)	
	)	
	)	
Wellness International Network, Ltd. aka WIN, Ralph Oats and Cathy Oats,	)	
	)	
Plaintiffs,	)	
	)	Adv. No. 09 A 00770
v.	)	
	)	
Richard Sharif, Individually and as Trustee of the Soad Wattar Trust	)	Judge Jacqueline P. Cox
	)	
Defendant.	)	

Order on Plaintiff's Motion to Compel or Motion for Sanctions

This matter is before the court on the motion of Wellness International Network, Ltd., Cathy Oats and Ralph Oats (collectively, the "Plaintiffs" or

"WIN") to compel the Debtor, Richard Sharif, to produce discovery documents, to attend a Rule 2004 examination, and to respond to various discovery requests and interrogatories. In the alternative, Plaintiffs' motion seeks sanctions against Mr. Sharif for failure to comply with discovery requests, deadlines and orders of this court. For the reasons that follow, Plaintiffs' motion for sanctions is GRANTED.

Background

Prior to filing his chapter 11 petition, the Debtor and the Plaintiffs herein were involved in litigation in the District Court for the Northern District of Texas. The Debtor and several other parties filed a complaint on July 8, 2005 against Wellness International Network, Ltd., WIN Network, Inc., Ralph Oats, Cathy Oats, and Sheri Matthews in the United States District Court for the Northern District of Texas asserting fraud, RICO and other claims seeking damages of nearly $1 million. Pls. Am. Compl. Objecting to Discharge, case no. 09 A 0770, dkt. no. 10 at 2 (the "Am. Compl."). The Debtor and his co-plaintiffs did not conduct any discovery in that action and did not cooperate with WIN's efforts to obtain discovery. *Id.* The Debtor and his co-plaintiffs did not serve initial disclosures and failed to respond to written discovery. *Id.* The Debtor and his co-plaintiffs had admissions deemed against them for their failure to respond to discovery requests. WIN subsequently moved for summary judgment on the grounds that the admissions negated all claims asserted; the Debtor and his co-

plaintiffs failed to introduce any evidence in support of the claims. *Id.* The district court granted summary judgment on these grounds. *Id.* The Debtor and his co-plaintiffs appealed the entry of summary judgment to the Fifth Circuit in 2007. *Id.* The Fifth Circuit affirmed all of the district court's rulings and noted:

> A review of the record on appeal demonstrates that Appellant's untimely performance in this court mirrors a lengthy history in the district court of dilatoriness and hollow posturing interspersed with periods of nonperformance or insubstantial performance and compliance by Appellants and their counsel, leaving the unmistakable impression that they have no purpose other than to prolong this contumacious litigation for purposes of harassment or delay, or both. The time is long overdue to terminate Appellants' feckless litigation at the obvious cost of time and money to the Defendants by affirming all rulings of the district court but remanding the case to that court for the reinstatement of its consideration of Appellees' motion for attorney's fees. In so doing, we caution Appellants that any further efforts to prolong or continue proceedings in this court, including the filing of petitions for rehearing, will potentially expose them to the full panoply of penalties, sanctions, damages, and double costs pursuant to FRAP 38 at our disposal.

Id. at 2-3 (citing *Sharif v. Wellness Intl Network*

Ltd., no. 07-10834, 2008 U.S. App. Lexis 7483, at *2 (5th Cir. April 8, 2008)). On remand the district court awarded the Plaintiffs herein attorneys' fees in the amount of $655,596.13 as a sanction against the Debtor and his co-plaintiffs. *See* Order on Mot. for Civil Contempt, Civil Action No. 3:05-CV-01367-B, Docket No. 180 at p.1, District Court for the Northern District of Texas, Dallas Division (February 10, 2009). Plaintiffs herein subsequently served the Debtor with post-judgment discovery and document requests. *Id.* The Debtor never complied with the Plaintiffs' discovery requests and did not tender responsive documents. *Id.*

The Plaintiffs filed a Motion to Compel post-judgment discovery on October 13, 2008; the motion was granted on November 19, 2008 and the Texas district court ordered the Debtor to respond to outstanding discovery requests. *Id.* at 1-2. Despite the district court's order compelling the Debtor to comply with discovery requests, the Debtor did not respond to such requests nor did he appear for a deposition. *Id.*

On December 4, 2008 Plaintiffs filed a Motion for Civil Contempt against the Debtor for violating the Texas court's order on the Motion to Compel. *Id.* At a show cause hearing on January 13, 2009, at which the Debtor did not appear, the Texas court found clear and convincing evidence that the Debtor had violated several court orders compelling the Debtor to comply with outstanding discovery requests and the order to appear at the January 13, 2009 show cause hearing. *Id.* at 3. The Texas court held the Debtor in civil contempt for his discovery violations

and ordered him to respond to post-judgment discovery and reimburse Plaintiffs for attorneys' fees and costs incurred to prepare and file the motion to compel and the motion for civil contempt. *Id.* at 3-5. On February 24, 2009, two weeks after the Texas court's contempt ruling, the Debtor filed the instant bankruptcy case.

On August 24, 2009, Plaintiffs filed adversary proceeding 09 A 00770 asking the court to deny Debtor a discharge pursuant to 11 U.S.C. § 727. Count I of the adversary complaint alleges that the Debtor "has continuously concealed property that he owns by holding such property in the name of the Soad Wattar Living Trust with improper intent to deceive" in violation of 11 U.S.C. § 727(a)(2). Am. Compl. ¶ 19. Plaintiffs further assert that the Debtor is the Trustee of the Soad Wattar Trust, exercises complete control over the trust, and holds out the assets in the trust as his own.

Count II alleges that the Debtor has "concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information" in violation of 11 U.S.C. § 727(a)(3). *Id.* at ¶ 22.

Count III alleges that the Debtor knowingly and fraudulently made a false oath or account in connection with his bankruptcy case in violation of 11 U.S.C. § 727(a)(4)(A). Specifically, Plaintiffs assert that Debtor failed to disclose companies in which he was an officer within the past 6 years despite the fact that part of Debtor's bankruptcy petition requires the Debtor to list all businesses in which the debtor was an officer, director, partner or

managing executive of a corporation. In response to this question Debtor did not list any businesses. *See* Statement of Financial Affairs ("SOFA"), Voluntary Chapter 7 Bankruptcy Petition (the "Petition"), case no. 09 B 05868, dkt. no. 1 at p. 29, ¶ 18. Plaintiffs assert that the Debtor is or has been an officer of Logan Square MRI and Diagnostic Center, Inc.; Allied Medical Management, Inc.; and Logan Square Surgery Center, Ltd.

Count IV alleges that the Debtor has failed to explain the loss of $5M in assets that he claimed to own in a 2002 Washington Mutual Bank, N.A. Loan Application (the "Loan Application") in violation of 11 U.S.C. § 727(a)(5). The assets listed in the Loan Application include the following: (1) Logan Square MRI Center; (2) Sharif Pharmacy; (3) Hermosa Medical Center; (4) three Banco Popular Accounts containing $90,000, $40,000 and $50,000, respectively; (3) $1,400,000 in a retirement fund 401(k); and $1,400,000 in real estate (collectively, the "Loan Application assets"). *See* Loan Application, Ex. No. 54 to Hearing Ex. No. 15 at p. WM 0840-0841. Although Debtor presently claims that he does not own any of the property that he once claimed to own in the loan application, he has failed to explain its loss or disposition.

Count V seeks a declaratory judgment that the Soad Wattar Trust is the alter ego of the Debtor because the Debtor exercises complete control over the trust, there is a unity of interest between Debtor and the trust such that separate personalities do not exist, and continuing to recognize the Debtor and the trust as separate would promote injustice.

On April 15, 2010, in this adversary proceeding, the Plaintiffs filed a Motion for Sanctions, Costs and Fees, and in the alternative, a Motion to Compel, Motion for Costs and Fees, and Motion to Modify Scheduling Order (hereinafter the "Sanctions Motion"). The court held a hearing on the Sanctions Motion on April 21, 2010. At the hearing, Plaintiffs argued that the Debtor had failed to comply with discovery requests and missed discovery deadlines for document production and responding to interrogatories. This court entered an order on April 21, 2010 compelling the Debtor to comply with all outstanding discovery by April 28, 2010 or else an order of default would be entered against the Debtor in adversary proceeding 09 A 00770. This court continued the hearing on the Sanctions Motion to April 28, 2010.

On April 28, 2010, the parties appeared before this court and the Plaintiffs noted that the Debtor had produced some documents along with certain interrogatory responses on the afternoon of April 27, 2010. *See* May 24, 2010 Transcript of Sanctions Hearing, *Wellness International, Ralph Oats, and Cathy Oats v. Richard Sharif, Individually and as Trustee of the Soad Wattar Trust* at 4 (the "Hearing Transcript"). This court continued the hearing to May 24, 2010 to allow Plaintiffs additional time to assess whether or not the Debtor's document production and discovery responses were in compliance with the April 21, 2010 order compelling the Debtor to comply with all outstanding discovery. At the hearing on May 24, 2010, the Plaintiffs argued that the Debtor still had not fully complied

with discovery requests and should be sanctioned. *Id.*

A. Debtor Failed to Sign or Verify His Interrogatory Responses

Federal Rule of Civil Procedure 33(b), applicable to this adversary pursuant to Bankruptcy Rule of Procedure 7033, requires:

> (1) ... [I]nterrogatories must be answered:
>
> (A) by the party to whom they are directed; or
>
> (B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.
>
> (3) ... Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath ...
>
> (5) The person who makes the answers must sign them, and the attorney who objects must sign any objections.

Fed. R. Civ. P. 33(b)(1)-(5). Additionally, the Seventh Circuit Court of Appeals and the United States District Court for the Northern District of Illinois have determined that under Rule 33, answers to interrogatories must be verified and must be signed by the person answering the interrogatory, not only by the party's attorney. *See, e.g., Hindmon v. Natl.-Ben Franklin Life Ins. Corp.*, 677 F.2d 617, 619 (7th Cir. 1982) (observing that interrogatory answers signed by an attorney and not the party violated "the

clear mandate of Federal Rule of Civil Procedure 33(a)"); accord *Overton v. City of Harvey*, 29 F.Supp.2d 894, 901 (N.D.I11.1998) (striking as summary judgment exhibit plaintiffs unverified answers to interrogatories signed only by attorney).

The Debtor's interrogatory responses as Trustee of the Soad Wattar Revocable Living Trust (the "Soad Wattar Trust") were signed by Debtor and Debtor's attorney but did not contain a statement verifying the interrogatory answers. *See* Hearing Transcript at 6; Richard Sharif's Answers to Interrogatories as Trustee of the Soad Wattar Revocable Living Trust, Hearing Ex. No. 3 at p. 9 ("Sharif Trustee Interrog. Answers"). Similarly, the Debtor's individual interrogatory responses were signed by Debtor's attorney and did not contain a statement verifying the interrogatory answers. *See* Richard Sharif's Answers to Plaintiffs' First Request for Interrogatories, Hearing Ex. No. 4 at p. 9 ("Sharif Individual Interrog. Answers"); Hearing Transcript at 6. They should have been signed by the Debtor as required by FRCP 33 and FRBP 7033.

Debtor was not present at the hearing and Debtor's attorney offered no explanation as to why the interrogatory responses were not signed and verified as required under the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure.

B. Debtor's Failure to Provide Documents Requested by Plaintiffs and the Trustee.

Plaintiffs asserted that the Debtor has continuously failed to produce numerous documents

that were requested by the Plaintiffs in requests for production and by the Trustee at the 341 meeting and in a subsequent motion to compel. Plaintiffs also asserted that the Debtor has failed to produce these documents despite this court's April 21, 2010 order compelling the Debtor to comply with all outstanding discovery requests.

1. Washington Mutual Loan Application and Related Documents

During the Debtor's initial 341 meeting on March 25, 2009, Plaintiffs and the United States Trustee requested that the Debtor provide documents relating to the Loan Application wherein the Debtor asserted that he owned various assets. The assets listed in the Loan Application include the following: (1) Logan Square MRI Center; (2) Sharif Pharmacy; (3) Hermosa Medical Center; (4) three Banco Popular Accounts containing $90,000, $40,000 and $50,000; (3) $1,400,000 in a retirement fund 401(k) account; and $1,400,000 in real estate. *See* Loan Application as noted above at p. WM 0840-0841. The 341 meeting was continued to April 21, 2009 to allow the Debtor additional time to gather any documents related to the Loan Application assets. *See* Sanctions Motion at p. 5. When the Debtor appeared at the continued 341 meeting he did not provide the U.S. Trustee or the Plaintiffs with the requested documents, and instead alleged that none of the Loan Application assets belonged to him. *Id.* The Debtor asserted that the Soad Wattar Trust owned all of the Loan Application assets, that the Debtor was the Trustee of the Trust, and that the Debtor had lied when he represented that he owned the assets listed in the Loan

Application. *Id.* At his Rule 2004 examination the Debtor confirmed under oath that he had testified at the 341 meeting that he lied in the Loan Application:

> Q: The third sentence [of Debtor's answer to the Amended Adversary Complaint states], defendant testified at the 341 meeting that he lied on the loan application, that he did not own of the real estate listed in the loan application, and that this property is owned by Soad Wattar Trust, his mother or sister. Do you see that statement? I'd be glad to orient you if you --
>
> A: Yeah. Is that by the Answer, defendant admits?
>
> Q: Uh huh.
>
> A: Yeah. That on April '09 — okay.
>
> Q: Is that a true statement?
>
> A: Yes, yeah.

May 13, 2010 Rule 2004 Examination of Richard Sharif, *Wellness International, Ralph Oats, and Cathy Oats v. Richard Sharif Individually and as Trustee of the Soad Wattar Trust*, Hearing Ex. No. 15 at pp. 60-61 ("Transcript of Debtor's 2004 Examination").

Based upon the Debtor's assertion that the Trust owned the assets listed in the Loan Application assets, the Plaintiffs and the U.S. Trustee requested documents relating to the formation and funding of the Soad Wattar Trust and documents evidencing ownership or transfer of the Loan Application assets.

See Sanctions Motion at p. 5. The 341 meeting was continued again to June 3, 2009 to give the Debtor time to provide the requested documents. At the June 3, 2009 meeting the Debtor again failed to provide any of the requested documents. Sanctions Motion at p. 5.

Subsequent to the Debtor's refusal to provide the documents requested at his second and third 341 meetings, the Debtor brought a Motion for Protective Order before this court and requested that he be granted leave to tender documents relating to the Loan Application and the Soad Wattar Trust under a protective order to prevent disclosure of information to the Debtor's creditors and creditors' attorneys. *See* 09 B 5868, dkt. no. 23. The Debtor's Motion for Protective Order was denied on June 11, 2009. *See* 09 B 5868, dkt. no. 25. Despite this court's denial of Debtor' Motion for Protective Order, the Debtor never tendered any documents relating to the Loan Application, thereby prompting the Trustee to file a Motion for Turnover of Documents from Richard Sharif to Horace Fox, Jr. ("Trustee's Motion") on October 20, 2009. *See* 09 B 5868, dkt. no. 40. This court granted the Trustee's Motion on October 27, 2009 (09 13 5868, dkt. no. 42). To date the Debtor has failed to comply with this court's order to turn over the required documents to the Trustee. *See* Sanctions Motion at p. 6.

The Plaintiffs also requested that the Debtor provide documents relating to each of the Loan Application assets in their requests for production. *See* Richard Sharif s Response to Plaintiffs' First Request for Production of Documents, Hearing Ex.

No. 1, ¶¶ 15-22 ("Sharif Production Responses"). The Debtor's response failed to produce any documents relating to the Loan Application assets.

2. Richard Sharif Revocable Trust Documents

Plaintiffs asserted that the Debtor failed to disclose all requested information or documents relating to the Richard Sharif Revocable Trust despite interrogatory and production requests requiring him to do so.

The Debtor listed the Richard Sharif Revocable Trust in his Petition as property owned by another person that the Debtor controls. *See* SOFA at p. 27. Based on this disclosure, the Plaintiffs' interrogatories requested the Debtor to identify each trust for the benefit of others that the Debtor had created or contributed to in the last five years. *See* Richard Sharif s Answers to Plaintiffs' First Request for Interrogatories, Hearing Ex. No. 4 at p. 8, ¶ 11 ; Richard Sharif s Response as Trustee to Plaintiffs' First Request for Production of Documents, Hearing Ex. No. 2 at p. 2, ¶ 11 ("Sharif Trustee Production Responses"). The Debtor responded to the interrogatory with the answer "none", which is wholly inconsistent with the Debtor's sworn bankruptcy schedules which list the Richard Sharif Revocable Trust on page 27. *See* Sharif Individual Interrog. Answers at p. 8, ¶ 11; Hearing Transcript at 9; SOFA ¶ 14.

The Plaintiffs also requested that the Debtor produce all documents referencing or evidencing any assets held in trust in which the Debtor claims or has an interest. Sharif Production Responses at ¶ 42

and Sharif Trustee Production Responses at ¶ 42. Again, despite Debtor's acknowledgment of having an interest in the Richard Sharif Revocable Trust in his sworn bankruptcy schedules (*See* SOFA at p. 27), the Debtor failed to produce any documents relating to the trust. Hearing Transcript at 9-11.

3. Bank Statements and Financial Records

Plaintiffs asserted that the Debtor failed to produce bank statements and account records relating to financial transactions involving Mr. Sharif individually and the Soad Wattar Trust. The Plaintiffs requested that the Debtor produce documents evidencing any account at a financial institution in which the Debtor is a designated signatory. Sharif Trustee Production Responses at p. 7, ¶ 44; Sharif Production Responses at pp. 7-8, ¶ 44. The Debtor failed to produce any documents responsive to these requests and instead listed the names and addresses of three financial institutions with corresponding account numbers. *See* Sharif Production Responses at p. 7, ¶ 44; Sharif Trustee Production Responses at p. 7, ¶ 44; Hearing Transcript at 11.

The Plaintiffs also requested that the Debtor produce documents relating to any checking, savings, money market, passbook, demand deposit, negotiable order of withdrawal or trust account in which the Debtor had any interest. Sharif Trustee Production Responses at p. 8, ¶ 49; Sharif Production Responses at p. 8, ¶ 49, The Debtor failed to produce any documents responsive to this request, even though he has a personal account with JP Morgan Chase

Bank, and acknowledged his lack of compliance during his 2004 examination. Transcript of Debtor's 2004 Examination at 166. Instead, the Debtor responded to Plaintiffs' requests by stating that any such documents are available at JP Morgan Chase and providing corresponding account numbers. Sharif Trustee Production Responses at p. 8, ¶ 49; Hearing Transcript at 11-12.

During their investigation, the Plaintiffs independently discovered numerous documents that the Debtor failed to produce relating to assets held at AG Edwards in which the Debtor has an interest. The Plaintiffs discovered account statements from AG Edwards for the period of September to October of 2003 in the name of Soad Wattar, the Debtor's mother, and Richard Sharif as joint tenants. A.G. Edwards & Sons, Inc. Account Statements, Ex. No. 61 to 2004 Examination of Debtor ("AG Statements"). These account statements revealed that approximately $752,050 in assets were held by AG Edwards in the joint tenancy of Soad Wattar and Richard Sharif. *See* AG Statements. In his Rule 2004 examination the Debtor admitted that while he does have documents relating to this AG Edwards account, he did not produce them. Transcript of Debtor's 2004 Examination at 172-173. The Debtor also stated that the assets in this AG Edwards account were transferred to Wachovia Bank, but the Debtor failed to produce any transfer documents. Transcript of Debtor's 2004 Examination at 174. The Debtor also failed to disclose the AG Edwards accounts in his bankruptcy petition. *See* Petition, The Debtor failed to produce information or

documentation regarding the AG Edwards account or its disposition despite interrogatories and requests for production requiring him to produce all documents evidencing any interest he had in any account from 2002 to the present, along with all documents showing the disposition or transfer of such accounts from 2002 to the present. *See* Sharif Trustee Production Responses at p. 8, ¶ 49; Sharif Individual Interrog. Answers at nos. 6-7; Hearing Transcript at 16-18.

The Plaintiffs also discovered a variable annuity held at AG Edwards for the benefit of the Debtor and his sister, Ragda Sharifeh, as joint tenants. The Plaintiffs found an AG Edwards statement showing the TransAmerica Triple Advantage VA with a valuation of $39,248. AG Statements at AGE 0180-0181. Once again, the Debtor failed to provide any information or produce any documentation relating to this annuity despite receiving interrogatories and document requests requiring him to do so. Hearing Transcript at 22. At his 2004 examination the Debtor was unable to identify where the $39,248 is currently located. Transcript of Debtor's 2004 Examination at 178-179.

The Plaintiffs estimate that approximately $912,000 in assets were held at AG Edwards for the benefit of the Debtor individually or jointly with his mother and his sister, yet the Debtor provided no discovery information or documentation regarding these AG Edwards accounts. Hearing Transcript at 24.

The Debtor also failed to provide any information

or documentation evidencing other accounts that he admitted to having an interest in at his 2004 Examination. Hearing Transcript at 26-31. The Debtor admitted to holding the following accounts but produced no documentation or information about the accounts in response to Plaintiff's' discovery requests: Soad Wattar Living Trust account at Banco Popular; account at Raymond Jones; checking account at JP Morgan Chase. During his Rule 2004 examination, Debtor admitted his failure to produce the requested documents and offered production:

1) Q: Sir, I'm just asking. You have not given me one single account statement for the trust [at Banco Popular], have you?

   A: Account statement?

   Q: Yes.

   A: You mean, from like the investment firm?

   Q: Yes.

   A: There are boxes available. These are, you know --

   Q: You have not provided us a single account statement, have you?

   A: I did not. Again, I did not know that you needed that one. If not, it's available.

2) Q: Where are there accounts besides Banco Popular?

   A: Banco Popular, absolutely, and whatever you need from Wells Fargo, provide you with it.

Q: I'm just asking for the names of the companies – Wells Fargo and who else?

A: Wells Fargo, Wachovia, which is now Wells Fargo, has a mortgage payment for the house because it comes out of the mother's living trust every month. This is two – three. What else?

Q: Any investment firms like Smith Barney or Morgan Stanley? I'm just throwing out people that I can think of.

A: There is one she [Debtor's mother] has an account with Raymond James, since 2005, one account. I just remembered this. I believe that's all I know right now.

3) Q: I'm asking why have you not produced to me the JP Morgan Chase account statements as requested in discovery?

A: Counsel, I did list the only account that I have. I'm sorry if I didn't produce the statement available. I know there's a question, Counselor, that I need to reproduce because my lawyer would have told me to produce it. I went by the name of the bank and my account but –

Transcript of Debtor's 2004 Examination at pp. 107-109; 143-144. Plaintiff's argue that even though the Debtor stated during the Rule 2004 Examination that he could produce documents relating to the undisclosed accounts, as shown above, the point is that the Debtor is still grossly out of

compliance with his discovery obligations despite this court's April 21, 2010 order compelling him to comply with all outstanding discovery.

4. Conveyance, Disposal, or Transfer of Asset Documents

Plaintiffs asserted, and Debtor Sharif s Answers to Interrogatories show, that the Debtor failed to provide information relating to the conveyance, disposal, or transfer of certain assets in which the Debtor once claimed an interest. *See* Sharif Individual Interrog. Answers and Sharif Trustee Interrog. Answers at p. 6-7, ¶¶ 16-8. At his 2004 examination the Debtor admitted that he had once owned a 10% interest in the Logan Square MRI & Diagnostic Center, Inc. ("Logan Square") and had relinquished such interest. *See* Transcript of Debtor's 2004 Examination at p. 95. However, the Debtor never provided any information or documentation evidencing the disposition of his interest in Logan Square, and he admitted the same at the 2004 examination despite having received Plaintiffs' interrogatories and requests for production inquiring about the disposition of his interest in Logan Square. *See* Transcript of Debtor's 2004 Examination at 96; Sharif Individual Interrog. Answers at p. 7, ¶¶ 6-8..

At his 2004 examination the Debtor denied ever having an ownership interest in Sharif Pharmacy (Transcript of Debtor's 2004 Examination at 61), but the Debtor produced a 2002 federal income tax return in which he represented to the IRS he was the 100% owner of Sharif Pharmacy. *See* Transcript of Debtor's 2004 Examination at 68. After the Debtor

was confronted with the inconsistency between his testimony and his 2002 federal income tax return Debtor stated that he does not examine his tax returns because his accountant does and he does not understand them. *Id.* at 69. The Debtor admitted that his ownership interest in the Sharif Pharmacy was 10% and that the 100% listed in his tax return was an error. *Id.* at 68. Whether the Debtor's ownership interest in Sharif Pharmacy was 10% or 100%, he produced no documentation evidencing the transfer of his interest in the pharmacy and acknowledged his failure to comply during the 2004 examination. *See* Transcript of Debtor's 2004 Examination at 72. The Debtor also admitted that he asked the office manager of Sharif Pharmacy for responsive documents from 1992 through the present but never undertook any other efforts to obtain documents from 2006 to the present. *Id.* at 87.

5. Corporate Records

Plaintiffs asserted that the Debtor failed to produce corporate records for Sharif Pharmacy and Hermosa Medical Center after 2006. Plaintiffs' discovery requests specifically designated corporate records for Sharif Pharmacy and Hermosa Medical Center as documents for production. *See* Sharif Trustee Production Responses, Hearing Ex. No. 2 at ¶¶ 7-8; Sharif Production Responses, Hearing Ex. No. 1 at ¶¶ 7-8. The Debtor never produced the requested documents even after this court's April 21, 2010 order compelling the Debtor's compliance with all outstanding discovery requests. Hearing Transcript at 34-36.

6. Documents Evidencing the Formation and Funding of the Soad Wattar Trust

Plaintiffs asserted that the Debtor failed to produce documents relating to the formation and funding of the Soad Wattar Trust. Hearing Transcript at 38. Plaintiffs argued that these documents are critical because nearly everything the Debtor owned is now in the Soad Wattar Trust.

Plaintiffs' requests for production required the Debtor to produce documents establishing and funding the Soad Wattar Trust, evidencing the transfer of assets into the trust, and all other documents related to assets held in the trust. *See* Sharif Trustee Production Responses, Hearing Ex. No. 2 at ¶¶ 27, 45-46, 49-50; Hearing Transcript at 38-41. Plaintiffs specifically requested all deeds, records, titles, or other documents that related to assets in the name of the Soad Wattar Trust from 2002 to the present. Debtor alleges that the Trust was funded with a $2,000,000 inheritance from his deceased father that came from an international wire transfer from Beirut, Lebanon through a financial entity in Dubai. Transcript of Debtor's 2004 Examination at 109. However, Debtor also admitted that he did not have any of the documents evidencing the wire transfers in his possession and that he had not produced such documents to Plaintiffs. Transcript of Debtor's 2004 Examination at 110-111. The Debtor also admitted that except for one asset, the Revere house, he had failed to produce any documents showing transfers of assets into the Soad Wattar Trust from 1992 to the present. *See id.* at 104-105. In sum, Debtor failed to produce

documentation showing from where the money and property in the Soad Wattar Trust came.

Plaintiffs also requested the 1992 trust instrument that purportedly established the Soad Wattar Trust. Sharif s Trustee Responses at ¶ 11 concern amendments to the Soad Wattar Trust and not the original document that established the Trust. Debtor admitted in his 2004 examination that he failed to produce the original trust instrument. Transcript of Debtor's 2004 Examination at 101.

7. Signed Tax Returns and Documents Used to Prepare Debtor's Tax Returns

Plaintiffs asserted that the Debtor failed to produce signed tax returns or any of the underlying source documents used to prepare such tax returns. Hearing Transcript at 44. While Plaintiffs did receive some federal and state tax returns from 2003-2008 from the Debtor, not one of the tax returns received was signed. *See* Hearing Transcript at 44; Sharif Production Responses at ¶ 10 and Sharif Trustee Production Responses at ¶ 10. When the Debtor was questioned about the unsigned tax returns at his 2004 examination, he stated that he was 100% sure that the tax returns that went to the government were signed, but he never produced any signed tax returns to the Plaintiffs. *See* Transcript of Debtor's 2004 Examination at 130-131. The Debtor also stated that he never attempted to obtain signed tax returns from the IRS. *Id.* at 130.

The Debtor also failed to produce the source documents used to prepare his tax returns and admitted the same in his 2004 examination. *See id* at 135.

8. Documents Evidencing Debts Owed to Debtor's Family Members

Plaintiffs asserted that the Debtor failed to produce any documents underlying the debts that he owes to his family members. *See* Sharif Production Responses & Sharif Trustee Production Responses at ¶¶ 34-37; Hearing Transcript at 54. The Debtor's bankruptcy petition listed several debts owed to the Debtor's family members including the following: (1) $49,000 to Haifa Kaj, Debtor's sister; (2) $39,000 to Jamal Sharif, Debtor's brother; (3) $93,000 to Ragda Sharifeh, Debtor's wife; and (4) $90,000 to Soad Wattar, Debtor's mother. *See* Petition at Schedule F, p. 17; Hearing Transcript at 55. Based on these disclosures in the Debtor's Schedule F, the Plaintiffs requested that the Debtor produce documents referencing or evidencing any debts owed to the above family members. *See* Sharif Production Responses, Hearing Ex. No. 1 at ¶¶ 34-37; Sharif Trustee Production Responses, Hearing Ex. No. 2 at ¶¶ 34-37. The Debtor failed to produce any documents evidencing the amounts he owes to his family and asserted that all of the debts were created with oral agreements. *See* Sharif Production Responses, ¶¶ 34-37; Hearing Transcript at 56. The Plaintiffs contend, and the court agrees, that it is hard to believe that $271,000 was transferred as loans to the Debtor and no documents such as wire transfer forms, bank statements, canceled checks,

emails, enclosure letters, etc. were created in doing so.

* * *

In response to all of the Plaintiffs' assertions regarding the Debtor's non-compliance, the Debtor's attorney argued that while there may be some deficiencies in the Debtor's discovery responses, the Debtor did make a good faith effort to comply with all discovery requests. Hearing Transcript at 75-76. Debtor's attorney pointed out that the Debtor was initially unable to meet the discovery deadlines because he was in Syria attending to his ill mother who subsequently passed away. Hearing Transcript at 68. When this court requested proof of the Debtor's whereabouts the Debtor's attorney produced airline tickets to Syria and a copy of the mother's death certificates. *Id.* This court does not believe that the Debtor made a serious effort to comply with Plaintiffs' discovery requests both before or after his mother's death.

Debtor's attorney argued that Plaintiffs' counsel never called him to object to the sufficiency of the discovery responses and production; Plaintiffs simply filed this motion for sanctions. Hearing Transcript at 68-69. Debtor's attorney also asserted that Plaintiff's supplement to their Sanctions Motion did not contain the proper certification as required by Northern District of Illinois Local Rule 37.2 certifying that the movant consulted with opposing counsel regarding the discovery defects before filing a motion pursuant to Federal Rule of Civil Procedure 26. Hearing Transcript at 77-78. This court notes that a phone

call would have been futile because the Debtor was so grossly out of compliance with his discovery obligations. This court also notes that Plaintiffs did in fact comply with Local Rule 37.2 because their Sanctions Motion contained the required certification. Sanctions Motion at 12.

Debtor's attorney asserts that he produced some documents after the Debtor's 2004 examination. Debtor's attorney argued that he surmised at the Debtor's 2004 examination that the plaintiffs wanted more documents than what they had received based on the questions that were posed to the Debtor; in response Debtor's attorney took it upon himself to produce bank statements from several financial institutions relating to the Soad Wattar Trust, the Debtor's personal bank accounts and the Sharif Pharmacy. Hearing Transcript at 70-71. Debtor's attorney never specified exactly which documents were produced after the 2004 examination so it is unclear what was contained in the late production, or whether the documents were responsive to Plaintiffs' requests and why they were not produced sooner. The court notes that the Debtor's 2004 examination took place on May 13, 2010, so any documents produced after that were well outside of the April 28, 2010 deadline that the court gave the Debtor to complete all outstanding discovery and prevented the Plaintiffs from questioning the Debtor about them at the Rule 2004 examination.

Conclusion

This court has stated time and time again that Bankruptcy Courts provide extraordinary relief

which requires extraordinary cooperation from Debtors. This extraordinary cooperation encompasses full compliance with all discovery requests in a timely manner. Failure to comply with discovery can result in sanctions including, but not limited to, a default judgment and attorneys' fees and costs. *See*, e.g., *In re Golant*, 239 F.3d 931, 933-34 (7th Cir. 2001) (affirming entry of default judgment against a debtor who failed to produce documents after the bankruptcy court compelled him to do so); *In re Thomas Consol. Indus.*, 2005 WL 3776322 (N.D. Ill. 2005) (affirming dismissal of claims as a sanction for violating bankruptcy court's discovery orders compelling compliance with outstanding discovery requests).

It is apparent to this court that the Debtor has failed to comply with most of the Plaintiffs' discovery requests as documented in this Order. While the court understands and sympathizes with the Debtor's loss of his mother, this court finds that Debtor's disclosures are still inadequate given this court's order compelling the Debtor to comply with all outstanding discovery by April 28, 2010. At no time has the Debtor asserted that he has not had sufficient time to comply with Plaintiffs' requests. The Debtor's lack of compliance is a pattern that has continued from the time of the underlying litigation in Texas to the instant bankruptcy case and adversary proceeding.

This court finds that the Debtor has failed to comply with this court's order compelling him to comply with all of Plaintiffs' outstanding discovery requests. As a sanction for Debtor's failure to comply

with discovery requests, this court enters default judgment against Debtor and in favor of Plaintiffs in adversary proceeding 09 A 00770. Judgment is entered in favor of Plaintiffs on all counts of their adversary complaint.

On Count I this court finds that the Debtor, with the intent to hinder, delay, or defraud Plaintiffs, has transferred, removed, destroyed, mutilated, or concealed property of the Debtor, within one year before the filing of the petition in violation of 11 U.S.C. § 727(a)(2). Specifically, the Debtor has failed to produce any documents regarding the assets in the Loan Application, which the Debtor once claimed to own, or what was transferred into the Soad Wattar Trust. Additionally, the Debtor has failed to produce any documents evidencing the formation or funding of the Soad Wattar Trust, or the disposition of the $5 million in assets listed in the Loan Application. This court finds that the Debtor has transferred, removed, destroyed, mutilated, or concealed these pertinent documents with the intent to hinder or delay Plaintiffs from discovering assets that may be used to satisfy the judgment amount that the Debtor owes to Plaintiffs.

On Count II this court finds that the Debtor has concealed, destroyed, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which his financial condition or business transactions might be ascertained in violation of 11 U.S.C. § 727(a)(3). Specifically, the Debtor has failed to produce any documents showing how his financial condition changed from the point when he claimed to own the

Loan Assets to now. The Debtor has not produced any documents showing his ownership interest in the Loan Assets and what happened to those assets.

On Count III this court finds that the Debtor knowingly and fraudulently made a false oath in connection with this bankruptcy case in violation of 11 U.S.C. § 727(a)(4)(A). Specifically, as noted above, the Debtor omitted material information from his bankruptcy schedules such as his failure to disclose companies in which he was an officer within the past six years.

On Count IV this court finds that the Debtor has failed to satisfactorily explain the loss of the assets listed in the Loan Application in violation of 11 U.S.C. § 727(a)(5)

On Count V this court enters a declaratory judgment in finding that the Soad Wattar Trust is the alter ego of the Defendant Richard Sharif because he treats its assets as his own property and it would be unjust to allow Debtor to maintain that the trust is a separate entity.

The Defendant is directed to reimburse Plaintiffs for attorneys' fees incurred to file and to prosecute the Sanctions Motion and the supplemental sanctions motion which was filed after the Debtor's Rule 2004 Examination. Debtor is directed to reimburse Plaintiffs for costs incurred in obtaining the Debtor's Rule 2004 examination, including court reporter and videographer costs.

Plaintiffs are hereby ordered to submit an affidavit within fourteen (14) days of the date of this order which sets forth the attorneys' fees and costs

associated with pursuing the Sanctions Motion and its supplement.

Due to the court's findings that the Debtor Richard Sharif has not carried out his discovery obligations and has violated 11 U.S.C. § 727, the court defaults Richard Sharif on the Amended Adversary Complaint herein and:

1. Richard Sharif is prohibited from opposing Plaintiffs' claims in adversary proceeding 09 A 00770;
2. Richard Sharif's answer to the Amended Complaint is stricken;
3. Default is entered in favor of the Plaintiffs and against Richard Sharif on Counts I through V of 09 A 00770;
4. Richard Sharif is hereby denied a discharge pursuant to 11 U.S.C. § 727(a)(2)-(a)(6).

Dated: July 6, 2010 ENTERED:

_____

Jacqueline P. Cox
United States Bankruptcy Judge

Appendix E

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to--

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise

related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in

part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

* * * *

OPPOSITION BRIEF

NO. 13-935

In The
Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LTD., RALPH OATES AND CATHY OATES

Petitioners,

v.

RICHARD SHARIF,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

Respondent's Brief In Opposition

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QUESTIONS PRESENTED

I. Whether the petition for a writ of certiorari should be denied on the grounds, the petition asks this Court to grant interlocutory review, contrary to this Court's policy against piecemeal appeals?

II. Whether the petition for certiorari should be denied on the grounds, "implied consent" to the exercise of authority barred by *Stern v. Marshall*, 131 S.Ct. 2594, (2011) cannot be derived solely from the fact that the Respondent did not expressly challenge the bankruptcy's court's authority before *Stern* was decided?

III. Whether the petition for a writ of certiorari should be denied on the grounds, the Petitioners, as creditors did not have standing under 11 U.S.C. § 541 to raise an alter-ego claim against the Respondent's mother's revocable living trust?

PARTIES TO THE PROCEEDINGS AND RULE 26.9 STATEMENT

Petitioner Wellness International Network Limited, is a subsidiary of WIN Network, Inc. No publicly-held entity owns ten percent or more of the stock of Wellness International Network, Limited.

The petitioners are Wellness International Network, Limited, Ralph Oates and Cathy Oates, the plaintiffs and appellees below.

The respondent is Richard Sharif, the defendant and appellant below.

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STATEMENT OF THE CASE

The Petitioners (hereinafter collectively referred to as "WIN") have adequately set forth the history of the proceedings in the court's below in their Statement of the Case. Therefore, it will not be necessary for the Respondent to repeat the entire history of the proceedings in this Response to WIN's Petition for Writ of Certiorari except for the following points.

Richard Sharif filed a voluntary bankruptcy petition under Chapter 7 of the Bankruptcy Code 11 U.S.C. §§ 701 *et.seq*. On November 3, 2009 WIN (the only creditors who filed a proof of claim in Sharif's bankruptcy case) filed an adversary complaint stating they had obtained a judgment in the amount of $655,596.13 in the Northern District of Texas against Richard Sharif and four other persons.

The first four (4) Counts of WIN's complaint contended that pursuant to 11 U.S.C. § 727 Sharif was not entitled to a discharge of his debts. Count V alleged "Plaintiffs are entitled to a Declaratory Judgment that the Soad Wattar Revocable Living Trust is the alter-ego of the Debtor and that all assets of the Trust should be treated as part of the Debtor's estate."

From December of 1996 until her death in March of 2010 Soad Wattar was the sole beneficiary of the Trust. Upon her death, Sharif's sister, Ragda Sharifeh became the beneficiary of the Trust. Sharif was named as a Successor Beneficiary from

April 24, 2007 until October 8, 2007 and acted as the Trustee of the Trust from the date upon which it was conceived in 1996 until the date he resigned on July 21, 2010. The Trust's assets for several years prior to Sharif filing for bankruptcy protection were held by Wells Fargo Financial Advisors who were investors for the Trust. The bankruptcy court as a sanction because of Sharif's failure to comply with WIN's discovery requests entered a final judgment which declared the Trust to be Sharif's alter ego.

Additionally, WIN in its Jurisdictional Statement and in its Statement of Case makes several statements which are not correct and are contradicted by the record in the court's below. Therefore, Sharif will address each of these incorrect statements below:

- In its Jurisdictional Statement WIN states that the first time Respondent raised a constitutional issue was in his reply brief in the appeals court. (Pet. pg.1, fn.1) This statement is not accurate because the Respondent's Docketing Statement filed in Appeal No.12-1349 shows that the Respondent asserted the bankruptcy court did not have the jurisdiction to enter the default judgment on Count V of WIN's complaint. (Dkt. Entry No. 5)

- WIN states at pg. 6 of its petition "Once in bankruptcy, Sharif again

> failed to produce documents about his assets to his bankruptcy trustee. Pet. App. 7a-8a. Based on a personal financial statement Wellness obtained showing that Sharif had more assets than he listed on his bankruptcy schedules, Wellness filed suit against Sharif in the bankruptcy court pursuant to 11 U.S.C. § 727 seeking to block Sharif's discharge. Pet App. 8a. As part of the complaint, Wellness also sought a declaratory judgment that assets Sharif purportedly held in the trust — the same assets appearing on Sharif's personal financial statement — actually were property of Sharif's bankruptcy estate. "

However these statements are not correct for the following reasons: First, on April 21, 2010, Horace Fox, Jr., the Trustee over Sharif's bankruptcy estate made the following statement to the bankruptcy court judge:

> MR. FOX: I have nothing substantive to add. I believe that the discovery that I had asked for has been substantially, although over a long period of time, complied with. (TR. pg. 9, 4/21/2010).

Therefore, the record shows that the Trustee advised the bankruptcy court on April 21, 2010

that Sharif had complied with his discovery requests. Admittedly, the 7th Circuit wrote in its opinion that Sharif had not turned over documents which the Trustee had requested. However, the 7th Circuit's statement is based upon 7th Circuit adopting the district court's finding which adopted the bankruptcy court's fictional finding.

In addition, WIN's statement that the assets contained in the Trust were the same assets listed on Sharif's personal financial statement is also not correct. On August 5, 2010 when Horace Fox, Jr., obtained an order to take control over the assets of the Soad Wattar Trust, the res of the Trust consisted of approximately $850,000 in securities and approximately $50,000 in cash. Whereas, Sharif's 2002 personal financial statement listed approximately 5 Million Dollars in real property, on-going businesses and cash which were actually owned by Sharif's sisters or did not exist.

- WIN also states at pg. 6 of its petition, *inter alia*, "On July 6, 2010, the bankruptcy court denied Sharif's summary judgment motion, entered a default judgment against Sharif in which the bankruptcy court found that the assets held by Sharif in the so called Soad Wattar Trust were property of Sharif's bankruptcy estate." (Pet. at pg. 6). However, three of these statements are not correct for the following reasons: First, the bankruptcy court never made any factual findings that the Soad Wattar Trust was Sharif's alter-ego, because the order entered by the bankruptcy

court clearly shows that the bankruptcy court as a sanction ruled that the Soad Wattar Trust was Sharif's alter-ego. (Dkt. Entry No. 68, Case No. 09-AP-00770); Secondly, the record also shows that the bankruptcy court never denied Sharif's summary judgment motion, because the record shows that an agreed order was entered into between the parties on the grounds that Sharif's summary judgment motion was moot after the bankruptcy court entered its July 6, 2010 order. (Dkt. Entry No. 71, Case No. 09-AP-00770); and, Thirdly, Sharif never owned any of the assets contained in the Soad Wattar Trust., nor did he ever reap any benefit from the Trust for acting as its Trustee. Because, Exhibits attached to Sharif's summary judgment motion clearly proved that the assets contained in the Trust were in fact owned by Sharif's mother Soad Wattar as the Beneficiary of the Trust, and, upon her death were to be owned by Sharif's sister, Ragda Sharifeh as the Successor Beneficiary to the Trust. These Exhibits also showed that Sharif never received any compensation from the Trust for acting as its Trustee. (Dkt. Entry No. 65, Case No. 09-AP-00770).

REASONS FOR DENYING THE PETITION

I. The Writ Should Be denied Because the Decision is Interlocutory and Two Fundamental Issues Remain Unresolved

WIN seeks immediate review of a judgment which is plainly interlocutory. The court of appeals REVERSED the district court's decision to AFFIRM the bankruptcy court's judgment on WIN's alter-ego claim alleged in Count V of their complaint and directed the district court to conduct further proceedings on remand. More specifically, the 7th Circuit Court of Appeals held:

> " In sum, the portion of the district court's judgment affirming the bankruptcy court's entry of default judgment denying discharge of Sharif's debts is AFFIRMED. The portion of the district court's judgment affirming the bankruptcy court;s entry of default judgment on WIN's alter-ego claim is VACATED, and the case is REMANDED to the district court for further proceedings consistent with the instructions set forth in this opinion. Lastly, the district court's judgment affirming the bankruptcy court's two fee awards is REVERSED and REMANDED to the district court with instructions to remand the orders to the bankruptcy court for recalculation." (WIN's Pet. App. 66a).

The 7th Circuit in its opinion also tendered specific instructions to the district court:

> "Accordingly, on remand the district court shall determine whether the alter-ego claim is a core or a non-core proceeding, then the court may treat the bankruptcy court's order purporting to enter final judgment on the alter-ego claim as proposed findings of fact and conclusions of law to be reviewed de novo. *See* Fed. R. Bankr. P. 9033(d) ("The district judge shall make a de novo review upon the record or, after additional evidence, of any portion of the bankruptcy judge's findings of fact or conclusions of law to which specific written objections has been made in accordance with this rule. The district judge may accept, reject, or modify the proposed findings of fact or conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instructions."). If on the other hand, the court determines the alter-ego claim to be a core proceeding, then it shall order that the reference of the alter-ego claim to be withdrawn and conduct fresh discovery proceedings in the district court, though the district judge will have the discretion in setting a more abbreviated schedule given that prior discovery has been had." (WIN's Pet. App. 54a).

Therefore, because the 7th Circuit has remanded this case to the district court to resolve two issues, WIN's petition for certiorari is premature. Additionally, WIN fails to mention in its petition that there is another bankruptcy court appeal presently pending in the district court which is directly related to this case in which WIN has intervened.

This appeal is docketed in the U.S. District Courts for the Northern District of Illinois as Case No. 11-CV-7374 and involves Sharif's sister, Ragda Sharifeh, wherein she seeks to recover the assets of the Soad Wattar Trust presently under the control of Sharif's bankruptcy Trustee in her capacity as the Successor Beneficiary of the Soad Wattar Trust. The Executive Committee for the N.D. of IL., has reassigned this appeal to the calendar of the district court judge to whom the 7th Circuit has directed to conduct further proceedings consistent with its instructions set forth in its opinion.

The interlocutory character of this case "of itself alone furnishe[s] sufficient ground for the denial" of WIN's petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see also *Brotherhood of Locomotive Fireman v. Banger & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) ("We generally await final judgment before exercising our certiorari jurisdiction").

Accordingly, until the district court complies with the 7th Circuit's mandate and until a final judgment is entered by the 7th Circuit related to any subsequent appeals arising from the district court's final judgment, WIN's petition for writ of certiorari is premature and should be denied.

II. Implied Consent In Waiving a Constitutional Right Cannot Be Derived From A Litigant's Failure To Raise An Unknown Constitutional Right

WIN suggests in its Petition at pg. 27 that "The Court should resolve the question of Whether Article III permits a Debtor who voluntarily files for bankruptcy to consent to the entry of a final judgment by the bankruptcy court." (Pet. at 27).

However, the law is well-settled that "an effective waiver must ....be one of a 'known right or privilege.'" *Curtis Publ'g Co. v. Butts,* 388 U.S. 130, 143 (1967) (citing *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938); *see also Krentz v. Robertson Fire Prot. Dist.,* 228 F.3d 807, 908 & n.8 (8th Cir. 2000). (knowing and voluntarily waiver standard applies in both civil and criminal context). As a general matter, "courts closely scrutinize waivers of constitutional rights, and 'indulge every reasonable presumption against a waiver.'" *Sambo's Rests., Inc., v. City of Ann Arbor,* 663 F.2d 686, U.S. 389 (1937).

A closely related principle is that where there is an intervening change in the law, an exception to normal waiver rules "exists to protect

those who, despite due diligence, fail to prophesy a reversal of established adverse precedent. *GenCorp, Inc. v. Olin Corp,* 477 F.3d 368, 375 (6th Cir. 2007). As this Court held in *Curtis Publishing,* a party does not waive a "known right" simply by failing to assert the right before it was recognized in a subsequent decision. 388 U.S. at 143-45; *see also Hormel v. Helvering,* 312 U.S. 552, 558-59 (1941) (exception to waiver exists in "those [cases] in which there have been judicial interpretations of existing law after decision below and pending appeal — interpretations which if applied might have materially altered the result"). The federal circuits have repeatedly reiterated this common-sense point; "Where the Supreme Court decides a relevant case while litigation is pending....omission of an argument based on the Supreme Court's reasoning does not amount to a waiver...." *Indiana Bell Tel. Co. v. McCarthy,* 362 F.3d 378, 390 (7th Cir. 2004). As the Second Circuit observed, "the doctrine of waiver demands conscientious, not clairvoyance, from parties," and thus a party should be allowed to assert a new objection on appeal when there is a "changed legal landscape." *Hawknet Ltd. v. Oversea Shipping Agencies,* 590 F.3d 87, 92-93 (2d Cir. 2009).

This Court's decision in *Stern v. Marshall,* 131 S.Ct. 2594 (2011), changed existing positive law by declaring part of 28 U.S.C. § 157(b)) unconstitutional. *Stern* effected a change in the existing positive law by declaring that — despite the language of § 157(b) — bankruptcy courts lack constitutional authority to issue final judgments on state law counterclaims that would not be resolved

in the process of ruling on a creditor's proof of claim. *Stern*, 131 S.Ct. at 2620.

Moreover, the question of whether implied consent based on a litigant's conduct is sufficient to satisfy the Article III requirement under *Stern*, is presently being considered by this Court in *Executive Benefits Insurance Agency v. Arkinson*, No. 12-1200 (argued January 14, 2014).

Finally, WIN in its petition at pg. 36, asks the Court to hold their petition in abeyance pending the Court's resolution of the *Executive Benefits* case if the Court denies their petition for certiorari. (Pet. at 36) However, holding WIN's petition in abeyance pending the Court's decision in *Executive Benefits* would only needlessly delay the proceedings related to case which are presently pending in district court. Moreover, if the Court's decision in *Executive Benefits* is in some way favorable to WIN arguments raised in their petition, WIN could move the district court pursuant to Rule 60 of the Federal Rules of Civil Procedure to vacate any adverse ruling that may be entered against them. Therefore, WIN will not suffer any prejudice if their petition is denied.

III. As a creditor WIN did not have standing under 11 U.S.C. § 541 to raise an alter-ego claim against the Soad Wattar Trust alleged in WIN's Adversary Complaint.

WIN argues at pg 23 of its petition that the Seventh Circuit's ruling conflicts with decisions of the First, Fourth, Fifth, Sixth, Eight and Tenth

Circuits, all of which hold that federal law dictates to what extent a debtor's property is property of the bankruptcy estate for purposes of 11 U.S.C. § 541. (Pet. at 23).

Additionally, WIN states in a footnote on this same page that "Sharif's argument that only a trustee has the ability to seek relief under § 541 is incorrect. Wellness did not seek turnover of estate property to itself; instead it sought a declaration that would benefit the estate. Creditors frequently bring such § 541 actions...." (Pet. at pg. 23, fn.2)

However, nowhere in WIN's petition has WIN argued that the Soad Wattar Trust was the alter-ego of Sharif or is the term alter-ego used. Instead, WIN in its petition refers to the Soad Wattar Trust as "assets Sharif purportedly held in trust." (Pet. at pg. 6) and "assets purportedly held by Sharif in the so called Soad Wattar Trust." (Pet. at pg. 6). Undoubtedly, because, only the Trustee has standing to bring an alter-ego claim under 11 U.S.C. § 541.

According to *Koch Refining v. Farmers Union Central Exchange,* 831 F.2d 1339 (1979), the Illinois alter-ego action is available first to the Chapter 7 case Trustee and then, upon abandonment, to any creditor who could have brought such action in the absence of the bankruptcy case. *See id.* at 1345-47 & n.9. As stated above, Horace Fox, Jr., the Trustee over Sharif's bankruptcy estate advised the bankruptcy court that he was satisfied with the discovery that

Sharif had produced. Consequently, he did not bring an alter-ego claim against the Soad Wattar Trust.

The issue of whether WIN had standing to bring an alter-ego claim against the Soad Wattar Trust in is still pending in the District Court in the Northern District of Illinois in Case No. 11-CV-7374 in which WIN has voluntarily intervened.

Moreover, the fact that WIN without having standing as a creditor brought the alter-ego claim against a non-party in this case, distinguishes this case from *Executive Benefits* case where the bankruptcy trustee who had standing to bring a § 541 action to recover property for the bankruptcy estate commenced an action. In light of WIN not having standing to bring the alter-ego action in this case the Court should deny their petition.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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REPLY BRIEF

No. 13-935

IN THE

Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LIMITED, RALPH OATS, AND CATHY OATS,

Petitioners,

v.

RICHARD SHARIF,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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March 21, 2014

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ARGUMENT

Respondent Sharif concedes that the Petition presents a split between the Seventh and the First, Fourth, Fifth, Sixth, Eighth and Tenth Circuits on Question One and between the Seventh and Sixth Circuits on Question Two. With respect to Questions Three and Four, the issues that overlap with those currently before the Court in *Executive Benefits Insurance Agency v. Arkison*, 133 S. Ct. 2880 (2013) (No. 12-1200), the Court has already found that a circuit split exists. That split has deepened since the Court granted review.

Sharif also does not deny that these questions are extremely important to the Nation's bankruptcy system, nor could he credibly do so. In each of the past four years, individuals and corporations have filed more than one million bankruptcy cases.[1] The relief bankruptcy affords to parties in dire financial straits, from individuals to mega-corporations and even municipalities, is an important engine of our economic system, making the efficient operation of the bankruptcy courts important to the Nation's economy. Amira Annabi, Michèle Breton, Pascal Francois, *Resolution of financial distress under Chapter 11*, Journal of Economic Dynamics & Control December 2012, Vol. 36 No. 12, 1867-87 (2012) ("[t]he recent bailout of some major U.S.

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[1] Bankruptcy filing statistics are available at the United States Court web site found at: http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings.

companies during the latest crisis has emphasized the complex and critical impact that bankruptcy can have on the economy as a whole").

The Seventh Circuit's decision threatens the efficient operation of the bankruptcy system at its very core. As this Court held in *Central Virginia Community College v. Katz*, a "[c]ritical feature[] of every bankruptcy" is "the exercise of exclusive jurisdiction over all of the debtor's property." 546 U.S. 356, 363-64 (2006). Yet, the Seventh Circuit concluded that bankruptcy courts lack the constitutional authority to decide whether property in the debtor's possession belongs to the bankruptcy estate under 11 U.S.C. § 541(a) when that determination also requires the bankruptcy court to decide an ancillary issue of state law. The Seventh Circuit also concluded that debtors who voluntarily elect to submit themselves and their property to the bankruptcy court's jurisdiction do not consent to the entry of final judgments by the bankruptcy court on such basic bankruptcy determinations.

State law establishes most property rights. *See, e.g.*, *Butner v. United States*, 440 U.S. 48, 55 (1979). Consequently, state law permeates the fundamental decisions of virtually every bankruptcy case, such as whether a debtor will be discharged, and what claims will be allowed against the estate. By removing the bankruptcy courts' authority to decide issues arising under the Bankruptcy Code if state law plays a role in the decision, the Seventh Circuit has crippled the bankruptcy courts' ability to oversee most aspects of

bankruptcy cases and rendered the bankruptcy courts "helpless indeed." *Mueller v. Nugent*, 184 U.S. 1, 14 (1902). Thus, as a result of the Seventh Circuit's decision, debtors may take advantage of the protections of the automatic stay and the other benefits of bankruptcy while simultaneously blocking the bankruptcy courts' authority to enter judgments against them.

That the Seventh Circuit reached this conclusion, which marks a radical departure from established precedent, demonstrates the confusion that exists in the lower courts over the reach of this Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). Until this Court resolves the circuit splits on the questions this case raises, the validity of countless judgments made by bankruptcy courts across the country will be in doubt and litigation raising *Stern* issues will continue to dominate the lower courts' dockets, creating great inefficiencies in the bankruptcy process and significant additional costs.

Instead of addressing the merits of Petitioner's request for review, Sharif makes three arguments. *First*, he urges the Court to defer consideration of the questions this Petition raises, arguing that the Petition is premature because the Seventh Circuit remanded the case for further proceedings. Respondent's Brief in Opposition ("Opp.") 6-9.

Second, Sharif argues with respect to Question Two that he could not have consented to the entry of a final judgment by filing his petition in bankruptcy

court because he filed for bankruptcy before *Stern*. This argument is not a basis on which the Court should decline to review this case. More importantly, this argument misses the fundamental distinction between *debtors*, like Sharif, who voluntarily seek bankruptcy relief and truly have consented to proceeding in a bankruptcy court by choosing to file a petition there, and *creditors*, who have not initiated those bankruptcy cases. Opp. 9-11.

Finally, Sharif raises an argument unrelated to the questions before the Court, claiming that creditors like Wellness may not ask the bankruptcy court to make determinations about what constitutes property of the estate. Sharif's argument is incorrect as a matter of law. More importantly, it is not a basis on which to deny the Petition. Opp. 11-13.

I. The Importance Of The Questions Presented Warrants Immediate Review.

Sharif does not dispute the importance of the questions this case raises. Instead, he urges the Court to defer their consideration because these questions are presented in an interlocutory posture. Opp. 6-9. But, as the Court has made clear repeatedly, the fact that an order is interlocutory is not a reason to deny review if the case presents an important and clear cut issue of law that otherwise would qualify for the Court's review. *See, e.g.*, *Tidewater Oil Co. v. United States*, 409 U.S. 151, 152 (1972).

In *Tidewater Oil*, for example, the Court granted review of a Ninth Circuit order declining to hear an interlocutory appeal under 28 U.S.C. § 1292(b) because the decision "raise[d] an important question of federal appellate jurisdiction" and there was a circuit split. 409 U.S. at 153; *accord F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 160 (2004) (granting *certiorari* of interlocutory order "to resolve a split among the Courts of Appeals" regarding the Sherman Act); *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 694 (2003) (granting certiorari of interlocutory order "to resolve the conflict" among the circuits regarding removal under 28 U.S.C. § 1441); *Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997) (granting *certiorari* of interlocutory order where decision below "is clearly erroneous under our precedents").

The Court also has granted review of interlocutory orders that present the same or similar issues as a case already pending before the Court where granting review would allow the Court to address those issues "in a wider range of circumstances." *See, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 260 (2003) (granting review "so that this Court could address the constitutionality of the consideration of race admissions in a wider range of circumstances").

Further, there are instances where the interlocutory nature of the order makes review particularly appropriate. For example, this Court has granted *certiorari* where doing so "is

fundamental to the further conduct of the case," *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *accord Land v. Dollar*, 330 U.S. 731, 734n.2 (1947) (same). In *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964), the Court granted review because it determined that "the eventual costs, [to the parties] will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided." Likewise, in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949), this Court granted *certiorari* because while "[t]he judgment of the Court of Appeals was not a final one, . . . we considered it appropriate for review here since, in our view, the jurisdictional issue was 'fundamental to the further conduct of the case.'" The Court also has recognized that the effect of some interlocutory orders are "immediate and irreparable," and therefore "any review by this Court . . . must be immediate to be meaningful." *Fed. Power Comm'n v. Transcont'l Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976).

All of these considerations justify immediate review of the Seventh Circuit's decision in this case. Sharif does not dispute that there is a circuit split on each of the four questions this case presents and that these questions are pure legal questions about the constitutional and statutory authority of the bankruptcy courts to hear and decide property of the estate determinations where the debtor holds the property.

Moreover, any proceedings that occur on remand will not change or further develop the record with respect to these purely legal questions. The Seventh Circuit issued two final constitutional decisions here, neither of which will change during or after the remand: first, that bankruptcy courts lack the constitutional authority to enter final judgments against debtors deciding whether property in the debtor's possession belongs to the bankruptcy estate under § 541 (the issue raised in Question One); and second, that bankruptcy courts may not exercise the judicial power of the United States to enter final orders against debtors who voluntary consented to proceed in the bankruptcy court by filing a bankruptcy petition (the issue raised in Questions Two and Three). The Seventh Circuit also has concluded that there is a gap in 28 U.S.C. § 157 that precludes bankruptcy courts from recommending findings of fact and conclusions of law in matters that are denominated as core under § 157, but outside of the bankruptcy court's constitutional authority to decide (the issue raised in Question Four). Pet. App. 53a-54a.

Nothing that happens on remand will alter those fundamental constitutional and statutory determinations. The Seventh Circuit remanded only "for further proceedings consistent with the instructions set forth in this opinion." *Id.* at 66a. Those instructions directed the district court to decide only whether the § 541 claim was core and fell within the statutory gap or non-core and outside of the gap. *Id.* at 54a. Whichever way that analysis

comes out, it will not change the Seventh Circuit's holding that bankruptcy courts no longer have the constitutional authority to enter final judgment orders deciding whether property in the debtor's possession belongs to the bankruptcy estate. Thus, the Seventh Circuit's constitutional and statutory conclusions are truly final in the sense that those rulings are now law of the case and cannot be altered below. Because, as Sharif concedes, these questions are important questions on which the circuits are split, the Court should address them now.

In addition, the analysis that the Seventh Circuit directed the district court to perform on remand is, at most, only tangentially related to the Seventh Circuit's conclusion that there is a statutory gap in § 157 and should not preclude this Court from granting the Petition for two reasons. First, as with its constitutional conclusions, the Seventh Circuit has conclusively ruled that there is a statutory gap in § 157. The district court's analysis of how that gap applies in this case will not alter the Seventh Circuit's underlying legal determination that the gap exists. Deciding this important question of statutory interpretation now also avoids the delay and expense of additional proceedings below, which could be quite extensive if the district court concludes that § 541 determinations are core proceedings. *Gillespie*, 379 U.S. at 152-53.

Second, the statutory gap question is not the primary focus of Wellness's Petition as that issue is already before the Court in *Executive Benefits*, 133

S. Ct. at 2880. Wellness seeks review of that question (listed as Question Four) only to the extent that the Court does not reach that issue in *Executive Benefits* or, if it does decide the issue, to allow the Court to remand this case to the Seventh Circuit to re-address the issue in light of the Court's ruling in *Executive Benefits*.

The overlap of issues with *Executive Benefits* is another reason to grant Wellness's Petition. As explained in Wellness's Petition, the Court may not reach both of the questions presented in *Executive Benefits*. Pet. 31-32. This case would allow the Court the opportunity to address those important questions in "a wider range of circumstances." *Gratz*, 529 U.S. at 260. Accordingly, granting review is appropriate under this Court's precedent.

II. Sharif's Merits-Based Argument On Question Two Is Not A Basis On Which To Deny The Petition.

Sharif also argues that the Court should not grant review of the second question—whether Article III permits the bankruptcy courts to exercise the judicial power of the United States over claims against a debtor where the debtor has consented to the exercise of such power by voluntarily filing for bankruptcy relief. Opp. 9-11. Sharif contends that he could not have consented to the bankruptcy court's entry of a final judgment because consent requires the waiver of a known right and he did not know he had a basis to object because the Court

decided *Stern* after the bankruptcy court ruled against him. *Id.*

Sharif's argument reflects a fundamental misunderstanding of the question Wellness asks this Court to review. The issue here is *not* whether Sharif failed to raise a timely objection to the bankruptcy court's entry of a final judgment in the bankruptcy court before that court entered judgment against him (although he did not timely object). Instead the issue is whether, by filing a bankruptcy petition in the first instance, a debtor consents to the entry of final judgments by the bankruptcy court on those matters that are central to the bankruptcy process, such as determining whether property in the debtor's actual or constructive possession is estate property.

Stern, which addressed whether, by filing a proof of claim, a *creditor* consents to the entry of final judgment by the bankruptcy court, is far removed from the issue of *debtor* consent. 131 S. Ct. at 2614. As explained in Wellness's Petition, the controlling decision of this Court is not *Stern* but *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 847-50 (1986). Pet. 27-31. *Schor* held that a party who files suit in a non-Article III forum consents to a final adjudication by that forum. 478 U.S. at 849-50. *Schor* preceded the filing of Sharif's bankruptcy petition by 23 years.

Sharif, who voluntarily filed for bankruptcy to stay contempt proceedings pending against him,

chose to proceed in bankruptcy court when he saw an advantage in doing so. Pet. App. 6a. As explained in Wellness's Petition, having voluntarily chosen the bankruptcy court, Sharif is no different from the litigants in *Schor*, who chose to file suit in an Article I forum. Pet. 30-31. Granting *certiorari* here to decide the question whether bankruptcy courts may enter final judgments against voluntary debtors is critical to the efficient administration of bankruptcy cases and to ensure uniformity across the circuits.

III. Sharif's Standing Argument Is Not A Basis On Which To Deny Review.

Sharif contends that the Court should not grant review because a creditor like Wellness lacks standing to bring a declaratory judgment action against the debtor asking the bankruptcy court to decide whether the debtor's property belongs to the bankruptcy estate. Opp. 11-13. As an initial matter, Sharif has waived his right to make this argument by not raising it until he was before the Seventh Circuit. *See generally* Adv. Proc. 09-00770 (Bankr. N.D. Ill.); Case 10-C-5303 (N.D. Ill.); No. 12-1349, Dkt. 13 at 9 (7th Cir.) (raising standing argument for first time in opening brief). Consequently, the Seventh Circuit properly declined to address the argument. *Coleman v. Hardy*, 690 F.3d 811, 818 (7th Cir. 2012).

Sharif's standing argument also lacks merit. To make his standing argument, Sharif likens Wellness's § 541 claim *against the debtor* to an alter

ego claim against a stranger to the debtor and then relies on a lone Seventh Circuit decision which holds that as a general rule only a trustee in bankruptcy may bring an alter ego claim against a stranger to the debtor. Opp. 11-13. Sharif's argument depends on a complete mischaracterization of Wellness's § 541 claim. Unlike the creditors in *Koch Refining v. Farmers Union Central Exchange*, 831 F.2d 1339 (7th Cir. 1987), the decision Sharif cites, Wellness is not suing a third party on a claim belonging to the estate. Instead, Wellness sued the debtor Sharif for a declaration that Sharif's alleged trust was a sham; a declaration that benefits all creditors of the estate. (Adv. Proc. 09-00770, Dkt. 1. ¶¶30-33 (Bankr. N.D. Ill.)). Sharif himself described the claim as one brought under federal law—§ 541. No. 12-1349, Dkt. 29 at 30-31 (7th Cir.).

The fact that Wellness alleged the trust was a sham because Sharif failed to comply with trust formalities does not transform the claim into a state law alter-ego action. Moreover, as a creditor, Wellness has an economic interest, and is a person aggrieved, by Sharif's claim that the property he held is not estate property. Thus, Wellness had standing. *See Clinton v. City of New York*, 524 U.S. 417, 432 (1998) (a "sufficient likelihood of economic injury" establishes standing); *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 642 (2d Cir. 1988) ("[a]s a general rule, creditors have standing to appeal orders . . . disposing of property of the estate because such orders directly affect the creditors' ability to receive payment of their claims").

CONCLUSION

For the foregoing reasons, the Court should grant the Petition, or, alternatively, hold this case pending its resolution of *Executive Benefits*.

Respectfully submitted,

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JOINT APPENDIX

No. 13-935

IN THE

Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LIMITED, RALPH OATS, AND CATHY OATS,

Petitioners,

v.

RICHARD SHARIF,

Respondent.

On Writ of Certiorari to the United States Court Of Appeals for the Seventh Circuit

JOINT APPENDIX

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NOTICE

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United States Bankruptcy Court
Northern District of Illinois (Chicago)
BANKRUPTCY PETITION #: 09-05868
Debtor: Richard Sharif

DATE	#	DOCKET TEXT
02/24/2009	1	Chapter 7 Voluntary Petition

United States Bankruptcy Court
Northern District of Illinois (Chicago)
Wellness International Network, Ltd., et al. v. Richard Sharif
ADVERSARY PROCEEDING #: 09-00770

DATE	#	DOCKET TEXT
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Northern District of Illinois
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CIVIL DOCKET FOR CASE #: 1:10-cv-05303

DATE	#	DOCKET TEXT
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01/12/2012	28	Motion by Appellant Richard Sharif to set a briefing schedule (*supplemental*)
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	No. 09-05868
	)	
RICHARD SHARIF,	)	Hon. Jacqueline P. Cox
Debtor.	)	
	)	Chapter 7
	)	
	)	
	)	
WELLNESS INTERNATIONAL NETWORK, LTD. a/k/a WIN, RALPH OATS, and CATHY OATS,	)	
Plaintiffs,	)	Adversary No. 09 A 00770
v.	)	
	)	
RICHARD SHARIF, INDIVIDUALLY AND AS TRUSTEE OF THE SOAD WATAR TRUST,	)	
	)	
Defendant.	)	

AMENDED COMPLAINT OBJECTING TO DISCHARGE

NOW COMES Wellness International Network, Ltd., WIN Network, Inc., Ralph Oats, and Cathy Oats (collectively "WIN" or "Plaintiffs"), creditors, and file this Amended Complaint Objecting

to Discharge of Richard Sharif ("Debtor") pursuant to 11 U.S.C. §727, and would respectfully show the Court as follows:

JURISDICTION

1. Jurisdiction over this adversary proceeding is based on 28 U.S.C. §§ 1334, 2201, 2202 and 157, Bankruptcy Rule 7001, 11 U.S.C. § 727. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J).

BACKGROUND

A. Origin of Debt - Previous Litigation

2. After unsuccessfully attempting to sustain a lawsuit in Illinois in violation of the venue clauses in their contractual agreements, Waqar and Shafqut Khan, Abdul and Shaheen Rashid, and Debtor filed a complaint on July 8, 2005, in the United States District Court for the Northern District of Texas against Wellness International Network, Ltd., WIN Network Inc., Ralph Oats, Cathy Oats, and Sheri Matthews, asserting fraud, RICO, and other claims in an attempt to avoid their contractual obligations with Wellness International Network, and seeking damages of almost $1 million.

3. The Khans, Rashid, and Debtor did not conduct any discovery in the underlying district court action, and refused to cooperate with WIN's efforts to obtain discovery. The Khans, Rashids, and Debtor never served their initial disclosures, failed and refused to respond to written discovery and had

admissions deemed against them, among other things.

4. WIN subsequently moved for summary judgment on, *inter alia*, the following grounds: (a) that the admissions conclusively negated each and every claim asserted by plaintiffs; and (b) that plaintiffs failed to introduce a scintilla of evidence on any claim. The district court granted summary judgment on these two grounds. Sharif and the other plaintiffs appealed this judgment to the Fifth Circuit in 2007. Briefing was completed, and the Fifth Circuit affirmed all of the district court's rulings in a very curt opinion:

> A review of the record on appeal demonstrates that Appellants' untimely performance in this court mirrors a lengthy history in the district court of dilatoriness and hollow posturing interspersed with periods of nonperformance or insubstantial performance and compliance by Appellants and their counsel, leaving the unmistakable impression that they have no purpose other than to prolong this contumacious litigation for purposes of harassment or delay, or both. The time is long overdue to terminate Appellants' feckless litigation at the obvious cost of time and money to the Defendants by affirming all rulings of the district court but remanding the case to that court for the reinstatement

> of its consideration of Appellees' motion for attorney's fees. In so doing, we caution Appellants that any further efforts to prolong or continue proceedings in this court, including the filing of petitions for rehearing, will potentially expose them to the full panoply of penalties, sanctions, damages, and double costs pursuant to FRAP 38 at our disposal.[1]

5. In accordance with the instruction from the Fifth Circuit, the district court awarded WIN over $650,000 in attorney fees as a sanction against Debtor and the Plaintiffs for years of feckless litigation in multiple venues (the "Judgment"). The Khans, Rashids, and Debtor appealed the district court's award of attorney fees, but dismissed the appeal before briefing began.

B. Post-Judgment Collection

6. Plaintiffs began collection efforts in late summer/early fall of 2008, and served post-judgment discovery on Debtor. The post-judgment discovery requested documents and information relating to assets owned by Debtor, including but not limited to, real property, businesses, bank accounts, retirement accounts and any trusts in which Debtor was a trustee or beneficiary. Debtor completely refused to respond to discovery, and refused to attend court-

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[1] *Sharif v. Wellness Int'l Network, Ltd.*, No. 07-10834, 2008 U.S. App. LEXIS 7483, at *2, ___ F. App'x __ (5th Cir. April 8, 2008) (not for publication).

ordered depositions. The Court ordered Debtor to provide the requested information and documents. Debtor refused to respond opting to conceal his assets.

7. Numerous contempt proceedings ensued. Debtor was arrested for contempt of court, and was released on his own recognizance and a promise to fully comply with the multitude of court orders directing them to fully respond to post-judgment discovery. Again, Debtor failed to respond to the post-judgment discovery.

8. On February 10, 2009, the Honorable Jane Boyle held a civil contempt hearing in Dallas, Texas, to which the Khans and Debtor showed up in person. During the hearing, Debtor represented to the District Court that he would respond to all outstanding discovery within two weeks. The District Court granted the motion for civil contempt and ordered Debtor to comply with all prior orders and post-judgment discovery, and to pay the Plaintiffs $1,500 in attorney fees for the contempt hearing. Debtor never complied. Instead of producing the discovery as ordered by the District Court in Dallas, and continuing his evasive attempt to conceal assets, Debtor filed for bankruptcy.

C. Bankruptcy

9. On February 24, 2009, two weeks after being held in contempt, Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy

Code. His voluntary petition listed Plaintiffs creditors.

10. Realizing that Debtor was not going to voluntarily disclose his assets, Plaintiffs pursued efforts to discover Debtor's asserts from sources other than Debtor. Although never produced by Debtor, during their efforts to acquire information on Debtor's assets, Plaintiffs obtained a loan application that Debtor submitted to Washington Mutual Bank, N.A. dated June 14, 2002 (the "Loan Application"). Debtor, individually, executed the Loan Application under penalty of perjury and unequivocally admitted that he owned the following: (1) three businesses (Logan Square MRI Center; Sharif Pharmacy; and Hermosa Medical Center) valued at $2.4 million; (2) three pieces of real property valued at $1.4 million (4344 N. Clarendon St. #16, 4344 N. Clarendon St. # 1602, and 2004 N. Pulaski St.); (3) a retirement account valued at $1.4 million; and (4) three bank accounts at Banco Popular with $180,000 in cash (the "Loan Application Assets"). Based upon these representations, Debtor obtained the loan. The Loan Application, as well as documents relating to the assets that Debtor admitted to owning in the Loan Application were responsive to Plaintiffs' post-judgment discovery, subject of the Court's order compelling Debtor to respond to Plaintiffs' post-judgment discovery and the contempt proceeding in the United States District Court in Dallas, Texas. Debtor refused to produce the Loan Application in that proceeding.

11. Debtor has continued to evade his disclosure obligations throughout this bankruptcy proceeding. On March 25, 2009, the parties held the initial Section 341 creditors' meeting. At this meeting, Plaintiffs and the Trustee requested Debtor provide documents related to the property listed in Debtor's Loan Application. The Trustee continued the creditors' meeting until April 21, 2009, to allow Debtor time to gather responsive documents.

12. On April 21, 2009, the creditors' meeting was continued. Debtor failed to provide any documents evidencing the ownership of the assets in the Loan Application. Again, Plaintiffs and the Trustee requested Debtor provide documents related to the property listed in the Bankruptcy Petition and property listed in the Loan Application, including documents showing the ownership of the real property, documents relating to the ownership of interests in the three businesses. In an attempt to end the creditors' inquiry into these assets, Debtor claimed that he lied on the Loan Application, that he did not own any of the property in the Loan Application and that this property is owned by the Soad Wattar Trust, which he is trustee. Plaintiffs and the Trustee also requested documents relating to the Soad Wattar Trust. The Trustee continued the creditors' meeting until June 3, 2009.

13. On June 3, 2009, the creditors' meeting was continued for a second time. Again, Debtor failed to provide documents evidencing the transfer or ownership of the assets he admitted that he owned in the Loan Application. Debtor has also

failed to provide any documents showing the formation or funding of any trust.

14. On June 9, 2009, Debtor filed his Motion for Protective Order [Docket No. 23] requesting the Court protect Debtor from having to disclose the information relating to the property listed in the Loan Application, including documents showing the ownership of the real property, documents relating to the ownership of interests in the three businesses, and documents relating to the Soad Wattar Trust to Plaintiffs. The Court denied this motion. Nevertheless, Debtor has continued to refuse to fully comply with his duty of disclosure and to produce responsive documents.

15. Debtor previously admitted to owning the property listed in the Loan Application when such ownership benefitted him to obtain the loan. Now, however, Debtor disclaims ownership because it benefits him in his attempt to discharge debt in bankruptcy.

16. Despite a claim that Soad Wattar Trust owns and has always owned the assets listed in the Loan Application, Debtor has failed and refused to provide any documents evidencing the formation or funding of any trust. To the extent such trust exists, Debtor claims to be the trustee and exercises complete control over the Soad Wattar Trust. Moreover, as evidenced by the Loan Application, Debtor has held out the assets of the Soad Wattar Trust as his own. To the extent such property is owned by the Soad Wattar Trust, there is such a

unity of interest between Debtor and the Soad Wattar Trust that their separate personalities no longer exist, and that there are circumstances such that continuing to recognize their separateness would sanction a fraud or promote injustice. To date, the only document that Debtor has produced relating to the Soad Wattar Living Trust is an Amendment to the Trust, which was executed by Debtor.

17. On June 23, 2009, Plaintiffs filed their Proof of Claim in this matter. The proof of claim amount is $655,596.13.

18. Pursuant to 11 U.S.C. §727, Plaintiffs object to the discharge of Debtor.

Count I
Violation of 11 U.S.C. § 727(a)(2)

19. Plaintiff realleges and incorporates by reference the allegations set forth in Paragraphs 2-17 above.

20. The Debtor, with intent to hinder, delay, or defraud Plaintiffs has transferred, removed, destroyed; mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed property of the debtor, within one year before the date of the filing of the petition; or property of the estate, after the date of the filing of the petition. For example, on June 14, 2002, in the Loan Application, Debtor admitted to owning approximately $5 million in assets. The Debtor now claims that these assets are owned by the Soad

Wattar Trust, of which he is allegedly the Trustee. Debtor, however, has failed and refused and continues to fail and refuse to provide any documents evidencing the formation and/or funding of the Soad Wattar Trust. Debtor has continuously concealed property that he admitted under penalty of perjury that he owned by claiming that such property is currently owned by the Soad Wattar Living Trust. Such claim is made with improper intent to deceive.

21. To the extent the property in the Loan Application has been transferred into the Soan Wattar Living Trust, upon information and belief, the Soad Wattar Living Trust is organized and operated as a mere tool or business conduit of Debtor and there is such unity between the entities that the separateness of Debtor and the Soad Wattar Living Trust that each entity has ceased and holding only Debtor liable would result in injustice. Specifically, during the final creditor's meeting, Debtor provided a single document related to the Soad Wattar Living Trust, the Amendment to the Trust, which was executed by Debtor. Debtor claims to be the Trustee of the trust, claims to have unfettered power of attorney to amend the trust, and exercises complete control over the trust and its assets. Debtor has held out the purported assets of the Soad Wattar Living Trust as his own, as evidenced by the Loan Application. To the extent that the Soad Wattar Living Trust exists, and the property in the Loan Application is currently owned by the Soad Wattar Living Trust, there is such a unity of interest between Debtor and the Soad Wattar Living Trust that their separate personalities no longer exist, and

that there are circumstances such that continuing to recognize their separateness would sanction a fraud or promote injustice.

22. By concealing this property and refusing to provide requested documents, the Debtor has violated 11 U.S.C. § 727(a)(2)(A) which necessitates the denial of the Debtor's discharge of his debts.

Count II
Violation of 11 U.S.C. § 727(a)(3)

23. Plaintiffs reallege and incorporate by reference the allegations set forth in Paragraphs 2-17 above.

24. Debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which his financial condition or business transactions might be ascertained. Specifically, Debtor previously admitted under oath that he owned the Loan Application Assets. Although WIN and Trustee requested documents relating to Debtor's financial condition, including his ownership interest in the Loan Application Assets, Debtor has failed and refused to provide any documents responding to these requests. In addition, Debtor now claims that the Loan Application Assets are owned by the Soad Wattar Living Trust. Debtor, however, has failed and refused to provide documents evidencing: (1) the formation and funding of the Soad Wattar Living

Trust; (2) that the Soad Wattar Living Trust owns the Loan Application Assets; and/or (3) when the Loan Application Assets were transferred, if ever, to the Soad Wattar Living Trust.

25. Debtor has either (1) improperly failed to provide, including documents evidencing the formation and funding of the Soad Wattar Living Trust; (2) concealed, destroyed, mutilated, falsified, or failed to keep or preserve any documents, including documents from which Plaintiffs can ascertain Debtor's financial condition or business transactions or the formation and funding of the Soad Wattar Living Trust; or (3) the Soad Wattar Living Trust does not exist and Debtor owns the assets listed in the Loan Application. As a result, Debtor has violated 11 U.S.C. § 727(a)(3), which necessitates the denial of the Debtor's discharge of his debts.

Count III
Violation of 11 U.S.C. § 727(a)(4)(A)

26. Plaintiff realleges and incorporates by reference the allegations set forth in Paragraphs 2-17 above.

27. Debtor knowingly and fraudulently, in or in connection with the case made a false oath or account. Specifically, Debtor omitted material asset information from his bankruptcy schedules. Specifically, Debtor failed to disclose companies in which he was an officer within the past six years.

Question 18 of the Petition asks the following question, in pertinent part:

> *If the debtor is an individual*, list the names, address, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partner in a partnership, sole proprietor, or was self-employed in a trade, profession, or other activity either full-or part-time within six years immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within six years immediately preceding the commencement of this case.

28. Under penalty of perjury, Debtor failed to list a single company. Based upon the Illinois Secretary of State, Debtor is or has been an officer in the following companies within the past six years: (1) Logan Square MRI and Diagnostic Center, Inc.; (2) Allied Medical Management, Inc.; and (3) Logan Square Surgery Center, Ltd. When asked at the creditor's meeting whether he has been an officer of these companies, Debtor responded "I don't know." By not listing his positions as an officer of these companies or even failing to make an attempt to determine whether he is an officer of these companies, the Debtor has given a false oath or account in violation of 11 U.S.C. §727(a)(4)(A) which

necessitates the denial of Debtor's discharge of his debts.

29. Debtor also knowingly and fraudulently, in or in connection with the case made a false oath or account by failing to list the Loan Application Assets. To the extent Debtor claims to hold this property in the name of the Soad Wattar Living Trust, he failed and refused to produce any documents evidencing the formation and funding of such trust. As discussed below, to the extent such property is owned by the Soad Wattar Living Trust, Plaintiffs seek a declaratory judgment that the Soad Wattar Living Trust is the alter ego of Debtor. As a result, Debtor knowingly and fraudulently, in or in connection with the case made a false oath or account by failing to list the Soad Wattar Living Trust.

30. By not listing this property, Debtor has given a false oath or account in violation of 11 U.S.C. §727(a)(4)(A) which necessitates the denial of Debtor's discharge of his debts.

Count IV
Violation of 11 U.S.C. § 727(a)(5)

31. Plaintiffs reallege and incorporate by reference the allegations set forth in Paragraphs 2-17 above.

32. As stated above, in the June 14, 2002 Loan Application, Debtor admitted, under penalty of perjury, that he owned more than $5 million in

assets. In the bankruptcy proceeding, Debtor failed to list the $5 million in property that he admitted that he previously admitted that he owned. Debtor now claims that he does not own this property, but has failed explain satisfactorily any loss of assets or deficiency of assets, and offered no documentation supporting any such explanation. In fact, Debtor unsuccessfully sought a protective order to prevent disclosing documents relating to his explanation, but continues to refuse to produce such documents.

33. By failing to explain the loss of the Loan Application Assets that Debtor represented that he owned, Debtor has violated 11 U.S.C. § 727(a)(5), which necessitates the denial of the Debtor's discharge of his debts.

Count V
Declaratory Judgment

34. Plaintiffs reallege and incorporate by reference the allegations set forth in Paragraphs 2-17 above.

35. This claim arises under the Declaratory Judgment Act 28 U.S.C. §§ 2201 and 2202 and a case of actual controversy exists within the jurisdiction of this Court. There is a justiciable controversy between Debtor and Plaintiffs as to the Debtor's ownership interest in property purportedly held in the name of the Soad Wattar Living Trust. To the extent the property in the Loan Application has been transferred into the Soad Wattar Living Trust, the Soad Wattar Living Trust is organized and operated

as a mere tool or business conduit of Debtor and there is such unity between the entities that the separateness of Debtor and the Soad Wattar Living Trust that each entity has ceased and holding only Debtor liable would result in injustice. To the extent that it exists, the Soad Wattar Living Trust operates under the exclusive direction and control of Debtor. Debtor claims to be the Trustee of this Trust and claims to have unfettered discretion to amend the Trust under a purported power of attorney. For example, during the final creditor's meeting, Debtor provided a single document related to the Soad Wattar Living Trust, the Amendment to the Trust, which was executed by Debtor.

36. In addition, Debtor has held out the purported assets of the Soad Wattar Living Trust as his own, as evidenced by the Loan Application. Debtor claimed to own the Loan Application Assets when it benefitted him to obtain the loan. Now, however, Debtor disclaims ownership of the Loan Application Assets because it benefits him in his attempt to discharge debt in bankruptcy.

37. To the extent that the Soad Wattar Living Trust exists, and the property in the Loan Application is currently owned by the Soad Wattar Living Trust, there is such a unity of interest between Debtor and the Soad Wattar Living Trust that their separate personalities no longer exist, and that there are circumstances such that continuing to recognize their separateness would sanction a fraud or promote injustice.

38. Plaintiffs are entitled to a declaratory judgment that the Soad Wattar Living Trust is the alter ego of Debtor and that all assets of the trust should be treated as part of Debtor's estate.

PRAYER

WHEREFORE, for the reasons set forth above, Plaintiffs respectfully request that the Court:

1) Deny the Debtor's Chapter 7 Bankruptcy Petition for discharge;

2) Enter a declaratory judgment that the Soad Wattar Living Trust is the alter ego of Debtor;

3) Grant Plaintiffs other relief that is just and equitable.

Respectfully submitted,

By: /s/ Michael J. Lang
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- and-

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Attorneys for Wellness
International Network, Ltd.
a/k/a WIN, et al

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 3rd day of November, 2009, this document was filed electronically in compliance with the Notice of Mandatory Electronic Filing and all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system.

/s/ Michael J. Lang
Michael J. Lang

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	No. 09-05868
	)	Chapter 7
RICHARD SHARIF,	)	Hon. Jacqueline P. Cox
Debtor.	)	United States
	)	Bankruptcy Judge
	)	
	)	
	)	
WELLNESS INTERNATIONAL NETWORK, LTD. a/k/a WIN, RALPH OATS, and CATHY OATS,	)	
Plaintiffs,	)	Adversary No. 09 A 00770
v.	)	
	)	
RICHARD SHARIF, INDIVIDUALLY AND AS TRUSTEE OF THE SOAD WATAR TRUST,	)	
Defendant.	)	

ANSWER TO AMENDED COMPLAINT OBJECTING TO DISCHARGE

Richard Sharif, debtor and defendant in this adversary proceeding by his attorney William J. Stevens answers the amended complaint of Wellness International Network, Ltd., WIN Network, Inc.,

Ralph Oats, and Cathy Oats (collectively "WIN" or "Plaintiffs") as follows.:

JURISDICTION

1. Allegation: Jurisdiction over this adversary proceeding is based on 28 U.S.C. §§ 1334, 2201, 2202 and 157, Bankruptcy Rule 7001, 11 U.S.C. § 727. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J).

Answer: Admitted.

2. Allegation: After unsuccessfully attempting to sustain a lawsuit in Illinois in violation of the venue clauses in their contractual agreements, Waqar and Shafqut Khan, Abdul and Shaheen Rashid, and Debtor filed a complaint on July 8, 2005, in the United States District Court for the Northern District of Texas against Wellness International Network, Ltd., WIN Network Inc., Ralph Oats, Cathy Oats, and Sheri Matthews, asserting fraud, RICO, and other claims in an attempt to avoid their contractual obligations with Wellness International Network, and seeking damages of almost $1 million.

Answer: Defendant admits that he and others engaged in litigation in the United States District Court for the Northern District of Illinois and in the United States Court of Appeals for the Seventh Circuit. Defendant admits that on July 8, 2005 he and others brought suit in the United States District Court for the Northern District of Texas against Wellness International Network, Ltd., WIN Network

Inc., Ralph Oats, Cathy Oats, and Sheri Matthews, asserting fraud, RICO, and other claims and sought damages. Except as expressly admitted the defendant denies the allegations of paragraph 2.

3. Allegation: The Khans, Rashid, and Debtor did not conduct any discovery in the underlying district court action, and refused to cooperate with WIN's efforts to obtain discovery. The Khans, Rashids, and Debtor never served their initial disclosures, failed and refused to respond to written discovery and had admissions deemed against them, among other things.

Answer: Defendant admits that admissions were deemed admitted and denies the remaining allegations of paragraph 3.

4. Allegation: WIN subsequently moved for summary judgment on, *inter alia*, the following grounds: (a) that the admissions conclusively negated each and every claim asserted by plaintiffs; and (b) that plaintiffs failed to introduce a scintilla of evidence on any claim. The district court granted summary judgment on these two grounds. Sharif and the other plaintiffs appealed this judgment to the Fifth Circuit in 2007. Briefing was completed, and the Fifth Circuit affirmed all of the district court's rulings in a very curt opinion: A review of the record on appeal demonstrates that Appellants' untimely performance in this court mirrors a lengthy history in the district court of dilatoriness and hollow posturing interspersed with periods of nonperformance or insubstantial performance and

compliance by Appellants and their counsel, leaving the unmistakable impression that they have no purpose other than to prolong this contumacious litigation for purposes of harassment or delay, or both. The time is long overdue to terminate Appellants' feckless litigation at the obvious cost of time and money to the Defendants by affirming all rulings of the district court but remanding the case to that court for the reinstatement of its consideration of Appellees' motion for attorney's fees. In so doing, we caution Appellants that any further efforts to prolong or continue proceedings in this court, including the filing of petitions for rehearing, will potentially expose them to the full panoply of penalties, sanctions, damages, and double costs pursuant to FRAP 38 at our disposal.

Answer: Defendant admits that WIN moved for summary judgment, that the district court granted summary judgment and that the United States court of Appeals for the Fifth Circuit used the quoted language in affirming the judgment. Except as admitted defendant denies the allegations of paragraph 4.

5. Allegation: In accordance with the instruction from the Fifth Circuit, the district court awarded WIN over $650,000 in attorney fees as a sanction against Debtor and the Plaintiffs for years of feckless litigation in multiple venues (the "Judgment"). The Khans, Rashids, and Debtor appealed the district court's award of attorney fees, but dismissed the appeal before briefing began.

Answer Defendant admits that WIN sought and obtained an award of over $650,000 in attorney's fees for work done by lawyers in the Illinois Federal Court Litigation and for work done by lawyers in Texas. Defendant admits that a notice of appeal was filed but that the appeal was dismissed without prejudice before briefs were filed. Except as expressly admitted defendant denies the allegations of paragraph 5.

6. Allegation: Plaintiffs began collection efforts in late summer/early fall of 2008, and served post-judgment discovery on Debtor. The post-judgment discovery requested documents and information relating to assets owned by Debtor, including but not limited to, real property, businesses, bank accounts, retirement accounts and any trusts in which Debtor was a trustee or beneficiary. Debtor completely refused to respond to discovery, and refused to attend court-ordered depositions. The Court ordered Debtor to provide the requested information and documents. Debtor refused to respond opting to conceal his assets.

Answer: Defendant admits that plaintiffs began collection efforts in late summer/early fall of 2008 and served post judgment discovery on Debtor. The discovery sought information relating to assets owned by debtor, real property, business bank accounts, retirement accounts and trusts. Plaintiffs obtained court orders. Except as expressly admitted defendant denies the allegations of paragraph 6.

7. Allegation: Numerous contempt proceedings ensued. Debtor was arrested for contempt of court, and was released on his own recognizance and a promise to fully comply with the multitude of court orders directing them to fully respond to postjudgment discovery. Again, Debtor failed to respond to the post-judgment discovery.

Answer: Defendant admits that numerous contempt proceedings ensued and that debtor surrendered in response to an arrest warrant issued at the request of plaintiffs. Defendant admits that he was released after a hearing before the Hon. Wayne Anderson in the Northern District of Illinois. Except as expressly admitted defendant denies the allegations of paragraph 7.

8. Allegation On February 10, 2009, the Honorable Jane Boyle held a civil contempt hearing in Dallas, Texas, to which the Khans and Debtor showed up in person. During the hearing, Debtor represented to the District Court that he would respond to all outstanding discovery within two weeks. The District Court granted the motion for civil contempt and ordered Debtor to comply with all prior orders and post-judgment discovery, and to pay the Plaintiffs $1,500 in attorney fees for the contempt hearing. Debtor never complied. Instead of producing the discovery as ordered by the District Court in Dallas, and continuing his evasive attempt to conceal assets, Debtor filed for bankruptcy.

Answer: Plaintiff admits that On February 10, 2009, the Honorable Jane Boyle held a civil contempt

hearing in Dallas, Texas, to which the Khans and Debtor showed up in person. During the hearing, Debtor represented to the District Court that he would respond to all outstanding discovery within two weeks. The District Court granted the motion for civil contempt and ordered Debtor to comply with all prior orders and post-judgment discovery, and to pay the Plaintiffs $1,500 in attorney fees for the contempt hearing. Defendant admits that he filed bankruptcy. Except as expressly admitted defendant denies the allegations of paragraph 8.

9. Allegation. On February 24, 2009, two weeks after being held in contempt. Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. His voluntary petition listed Plaintiffs [as] creditors.

Answer Admitted.

10. Allegation. Realizing that Debtor was not going to voluntarily disclose his assets, Plaintiffs pursued efforts to discover Debtor's asserts from sources other than Debtor. Although never produced by Debtor, during their efforts to acquire information on Debtor's assets, Plaintiffs obtained a loan application that Debtor submitted to Washington Mutual Bank, N.A. dated June 14, 2002 (the "Loan Application"). Debtor, individually, executed the Loan Application under penalty of perjury and unequivocally admitted that he owned the following: (1) three businesses (Logan Square MRI Center; Sharif Pharmacy; and Hermosa Medical Center) valued at $2.4 million; (2) three pieces of real

property valued at $1.4 million (4344 N. Clarendon St. #16, 4344 N. Clarendon St. #1602, and 2004 N. Pulaski St.); (3) a retirement account valued at $1.4 million; and (4) three bank accounts at Banco Popular with $180,000 in cash (the "Loan Application Assets"). Based upon these representations, Debtor obtained the loan. The Loan Application, as well as documents relating to the assets that Debtor admitted to owning in the Loan Application were responsive to Plaintiffs' post-judgment discovery, subject of the Court's order compelling Debtor to respond to Plaintiffs' post-judgment discovery and the contempt proceeding in the United States District Court in Dallas, Texas. Debtor refused to produce the Loan Application in that proceeding.

Answer: Defendant admits that plaintiffs obtained a copy of the June 14, 2002 loan application to Washington Mutual (WM 0840-WM 0842), admits that he signed the acknowledgment and agreement on page 3 of the document and admits that a copy of the agreement was filed in this case as Document 17-1 on December 8, 2009. Except as expressly admitted defendant denies the allegations of paragraph 10.

11. Allegation: Debtor has continued to evade his disclosure obligations throughout this bankruptcy proceeding. On March 25, 2009, the parties held the initial Section 341 creditors' meeting. At this meeting, Plaintiffs and the Trustee requested Debtor provide documents related to the property listed in Debtor's Loan Application. The

Trustee continued the creditors' meeting until April 21, 2009, to allow Debtor time to gather responsive documents.

Answer: Defendant admits that. On March 25, 2009, the parties held the initial Section 341 creditors' meeting. At this meeting, Plaintiffs and the Trustee requested Debtor provide documents related to the property listed in Debtor's Loan Application. The Trustee continued the creditors' meeting until April 21, 2009, to allow Debtor time to gather responsive documents. Except as expressly admitted defendant denies the allegations of paragraph 11.

12. Allegation: On April 21, 2009, the creditors' meeting was continued. Debtor failed to provide any documents evidencing the ownership of the assets in the Loan Application. Again, Plaintiffs and the Trustee requested Debtor provide documents related to the property listed in the Bankruptcy Petition and property listed in the Loan Application, including documents showing the ownership of the real property, documents relating to the ownership of interests in the three businesses. In an attempt to end the creditors' inquiry into these assets, Debtor claimed that he lied on the Loan Application, that he did not own any of the property in the Loan Application and that this property is owned by the Soad Wattar Trust, which he is trustee. Plaintiffs and the Trustee also requested documents relating to the Soad Wattar Trust. The Trustee continued the creditors' meeting until June 3, 2009.

Answer: Defendant admits that on April 21, 2009, the creditors' meeting was continued. Plaintiffs and the Trustee requested Debtor provide documents related to the property listed in the Bankruptcy Petition and property listed in the Loan Application, including documents showing the ownership of the real property. Debtor testified at the 341 meeting that he lied on the Loan Application, that he did not own any of the real estate listed in the Loan Application and that this property is owned by the Soad Wattar Trust, his mother or sister. Defendant admits that he is trustee of the Soad Watter trust and that his mother is beneficiary of the trust. Plaintiffs and the Trustee also requested documents relating to the Soad Wattar Trust. The Trustee continued the creditors' meeting until June 3, 2009. Except as expressly admitted defendant denies the allegations of paragraph 12.

13 Allegation: On June 3, 2009, the creditors' meeting was continued for a second time. Again, Debtor failed to provide documents evidencing the transfer or ownership of the assets he admitted that he owned in the Loan Application. Debtor has also failed to provide any documents showing the formation or funding of any trust.

Answer: Defendant admits that on June 3, 2009, the creditors' meeting was continued for a second time. Defendant admits that he provided Trustee Fox with documents on dates other than June 3, 2009. Except as expressly admitted defendant denies the allegations of paragraph 13.

14 Allegation: On June 9, 2009, Debtor filed his Motion for Protective Order [Docket No. 23] requesting the Court protect Debtor from having to disclose the information relating to the property listed in the Loan Application, including documents showing the ownership of the real property, documents relating to the ownership of interests in the three businesses, and documents relating to the Soad Wattar Trust to Plaintiffs. The Court denied this motion. Nevertheless, Debtor has continued to refuse to fully comply with his duty of disclosure and to produce responsive documents.

Answer: Defendant admits that on June 9, 2009, Debtor filed his Motion for Protective Order [Docket No. 23] requesting the Court protect Debtor from having to disclose the information relating to his mother's or sister's property listed in the Loan Application, including documents showing the ownership of the real property, documents relating to the ownership of interests in the three businesses, and documents relating to the Soad Wattar Trust to Plaintiffs. The Court denied this motion. Nevertheless, Except as expressly admitted defendant denies the allegations of paragraph 14.

15. Allegation: Debtor previously admitted to owning the property listed in the Loan Application when such ownership benefitted him to obtain the loan. Now, however, Debtor disclaims ownership because it benefits him in his attempt to discharge debt in bankruptcy.

Answer Defendant denies the allegations of paragraph 15.

16. Allegation: Despite a claim that Soad Wattar Trust owns and has always owned the assets listed in the Loan Application, Debtor has failed and refused to provide any documents evidencing the formation or funding of any trust. To the extent such trust exists, Debtor claims to be the trustee and exercises complete control over the Soad Wattar Trust. Moreover, as evidenced by the Loan Application, Debtor has held out the assets of the Soad Wattar Trust as his own. To the extent such property is owned by the Soad Wattar Trust, there is such a unity of interest between Debtor and the Soad Wattar Trust that their separate personalities no longer exist, and that there are circumstances such that continuing to recognize their separateness would sanction a fraud or promote injustice. To date, the only document that Debtor has produced relating to the Soad Wattar Living Trust is an Amendment to the Trust, which was executed by Debtor.

Answer: Defendant admits that the Soad Wattar Trust exixts. Except as expressly admitted the defendant denies the allegations of paragraph 16.

17. Allegation: On June 23, 2009, Plaintiffs filed their Proof of Claim in this matter. The proof of claim amount is $655,596.13.

Answer: admitted.

18. Allegation: Pursuant to 11 U.S.C. §727, Plaintiffs object to the discharge of Debtor.

Answer Defendant admits that plaintiffs object to discharge pursuant to 11 USC §727, but denies that plaintiffs are entitled to such relief.

19. Defendant realleges and incorporates by reference the allegations set forth in Paragraphs 2-17 above.

20. Allegation The Debtor, with intent to hinder, delay, or defraud Plaintiffs has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed property of the debtor, within one year before the date of the filing of the petition; or property of the estate, after the date of the filing of the petition. For example, on June 14, 2002, in the Loan Application, Debtor admitted to owning approximately $5 million in assets. The Debtor now claims that these assets are owned by the Soad Wattar Trust, of which he is allegedly the Trustee. Debtor, however, has failed and refused and continues to fail and refuse to provide any documents evidencing the formation and/or funding of the Soad Wattar Trust. Debtor has continuously concealed property that he admitted under penalty of perjury that he owned by claiming that such property is currently owned by the Soad Wattar Living Trust. Such claim is made with improper intent to deceive.

Answer: Defendant denies the allegations of paragraph 20.

21. Allegation To the extent the property in the Loan Application has been transferred into the

Soan Wattar Living Trust, upon information and belief, the Soad Wattar Living Trust is organized and operated as a mere tool or business conduit of Debtor and there is such unity between the entities that the separateness of Debtor and the Soad Wattar Living Trust that each entity has ceased and holding only Debtor liable would result in injustice. Specifically, during the final creditor's meeting, Debtor provided a single document related to the Soad Wattar Living Trust, the Amendment to the Trust, which was executed by Debtor. Debtor claims to be the Trustee of the trust, claims to have unfettered power of attorney to amend the trust, and exercises complete control over the trust and its assets. Debtor has held out the purported assets of the Soad Wattar Living Trust as his own, as evidenced by the Loan Application. To the extent that the Soad Wattar Living Trust exists, and the property in the Loan Application is currently owned by the Soad Wattar Living Trust, there is such a unity of interest between Debtor and the Soad Wattar Living Trust that their separate personalities no longer exist, and that there are circumstances such that continuing to recognize their separateness would sanction a fraud or promote injustice.

Answer: Defendant admits that he signed the loan application, admits that he is the trustee of the Soad Wattar Living Trust and admits that he has provided trust documents and tax returns pertaining to the Soad Wattar Living Trust to trustee in bankruptcy. Except as expressly admitted defendant denies the allegations of paragraph 21.

22. Allegation: By concealing this property and refusing to provide requested documents, the Debtor has violated 11 U.S.C. § 727(a)(2)(A) which necessitates the denial of the Debtor's discharge of his debts.

Answer: Denied.

23. Defendant realleges and incorporate by reference the allegations set forth in Paragraphs 2-17 above.

24. Allegation Debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which his financial condition or business transactions might be ascertained. Specifically, Debtor previously admitted under oath that he owned the Loan Application Assets. Although WIN and Trustee requested documents relating to Debtor 's financial condition, including his ownership interest in the Loan Application Assets, Debtor has failed and refused to provide any documents responding to these requests. In addition, Debtor now claims that the Loan Application Assets are owned by the Soad Wattar Living Trust. Debtor, however, has failed and refused to provide documents evidencing: (1) the formation and funding of the Soad Wattar Living Trust; (2) that the Soad Wattar Living Trust owns the Loan Application Assets; and/or (3) when the Loan Application Assets were transferred, if ever, to the Soad Wattar Living Trust.

Answer Defendant admits that he signed the loan application. Except as expressly admitted defendant denies the allegations of paragraph 24.

25. Allegation. Debtor has either (1) improperly failed to provide, including documents evidencing the formation and funding of the Soad Wattar Living Trust; (2) concealed, destroyed, mutilated, falsified, or failed to keep or preserve any documents, including documents from which Plaintiffs can ascertain Debtor's financial condition or business transactions or the formation and funding of the Soan Wattar Living Trust; or (3) the Soad Wattar Living Trust does not exist and Debtor owns the assets listed in the Loan Application. As a result, Debtor has violated 11 U.S.C. § 727(a)(3), which necessitates the denial of the Debtor's discharge of his debts.

Answer Defendant denies the allegations of paragraph 25.

26. Defendant realleges and incorporates by reference the allegations set forth in Paragraphs 2-17 above.

27. Allegation Debtor knowingly and fraudulently, in or in connection with the case made a false oath or account. Specifically, Debtor omitted material asset information from his bankruptcy schedules. Specifically, Debtor failed to disclose companies in which he was an officer within the past six years. Question 18 of the Petition asks the following question, in pertinent part:

If the debtor is an individual, list the names, address, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partner in a partnership, sole proprietor, or was self-employed in a trade, profession, or other activity either full-or part-time within six years immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within six years immediately preceding the commencement of this case.

Answer Defendant admits the text of question 18 on the Statement of Affairs. Except as expressly admitted defendant denies the allegations of paragraph 27.

28 Allegation Under penalty of perjury, Debtor failed to list a single company. Based upon the Illinois Secretary of State, Debtor is or has been an officer in the following companies within the past six years: (1) Logan Square MRI and Diagnostic Center, Inc.; (2) Allied Medical Management, Inc.; and (3) Logan Square Surgery Center, Ltd. When asked at the creditor's meeting whether he has been an officer of these companies, Debtor responded "I don't know." By not listing his positions as an officer of these companies or even failing to make an attempt to determine whether he is an officer of

these companies, the Debtor has given a false oath or account in violation of 11 U.S.C. §727(a)(4)(A) which necessitates the denial of Debtor's discharge of his debts.

Answer Defendant admits that he has been affiliated with (1) Logan Square MRI and Diagnostic Center, Inc.; (2) Allied Medical Management, Inc.; and (3) Logan Square Surgery Center, Ltd. And admits that When asked at the creditor's meeting whether he has been an officer of these companies, he responded "I don't know." Except as expressly admitted defendant denies the allegations of paragraph 28.

29 Allegation Debtor also knowingly and fraudulently, in or in connection with the case made a false oath or account by failing to list the Loan Application Assets. To the extent Debtor claims to hold this property in the name of the Soad Wattar Living Trust, he failed and refused to produce any documents evidencing the formation and funding of such trust. As discussed below, to the extent such property is owned by the Soad Wattar Living Trust, Plaintiffs seek a declaratory judgment that the Soad Wattar Living Trust is the alter ego of Debtor. As a result, Debtor knowingly and fraudulently, in or in connection with the case made a false oath or account by failing to list the Soad Wattar Living Trust.

Answer Defendant denies the allegations of paragraph 29.

30. Allegation By not listing this property, Debtor has given a false oath or account in violation of 11 U.S.C. §727(a)(4)(A) which necessitates the denial of Debtor 's discharge of his debts.

Answer Defendant denies the allegations of paragraph 30.

31. Defendant realleges and incorporate by reference the allegations set forth in Paragraphs 2-17 above.

32. Allegation As stated above, in the June 14, 2002 Loan Application, Debtor admitted, under penalty of perjury, that he owned more than $5 million in assets. In the bankruptcy proceeding, Debtor failed to list the $5 million in property that he admitted that he previously admitted that he owned. Debtor now claims that he does not own this property, but has failed explain satisfactorily any loss of assets or deficiency of assets, and offered no documentation supporting any such explanation. In fact, Debtor unsuccessfully sought a protective order to prevent disclosing documents relating to his explanation, but continues to refuse to produce such documents.

Answer. Defendant admits that he signed the loan application. Defendant denies that he owned more than $5 million dollars of assets. Defendant admits that in his bankruptcy he did not schedule property which he did not own. Defendant admits that he sought a protective order to protect his mother and sister; however after the denial of the

protective order he has provided the bankruptcy trustee with the information requested. Except as expressly admitted defendant denies the allegations of paragraph 32.

33. Allegation: By failing to explain the loss of the Loan Application Assets that Debtor represented that he owned, Debtor has violated 11 U.S.C. § 727(a)(5), which necessitates the denial of the Debtor's discharge of his debts.

Answer : Denied.

34. Defendant realleges and incorporate by reference the allegations set forth in Paragraphs 2-17 above.

35. Allegation This claim arises under the Declaratory Judgment Act 28 U.S.C. §§ 2201 and 2202 and a case of actual controversy exists within the jurisdiction of this Court. There is a justiciable controversy between Debtor and Plaintiffs as to the Debtor's ownership interest in property purportedly held in the name of the Soad Wattar Living Trust. To the extent the property in the Loan Application has been transferred into the Soad Wattar Living Trust, the Soad Wattar Living Trust is organized and operated as a mere tool or business conduit of Debtor and there is such unity between the entities that the separateness of Debtor and the Soad Wattar Living Trust that each entity has ceased and holding only Debtor liable would result in injustice. To the extent that it exists, the Soad Wattar Living Trust operates under the exclusive direction and control of

Debtor. Debtor claims to be the Trustee of this Trust and claims to have unfettered discretion to amend the Trust under a purported power of attorney. For example, during the final creditor's meeting, Debtor provided a single document related to the Soad Wattar Living Trust, the Amendment to the Trust, which was executed by Debtor.

Answer: Defendant admits that plaintiffs make a claim under the Declaratory Judgment act. Defendant admits that he is trustee of the Soad Wattar Living Trust and faithfully discharges his fiduciary duties under the trust to his mother as beneficiary. Defendant denies that he receives any personal benefit from the trust. Defendant denies that the trust is property of the estate. Except as expressly admitted defendant denies the allegations of paragraph 35.

36. Allegation: In addition, Debtor has held out the purported assets of the Soad Wattar Living Trust as his own, as evidenced by the Loan Application. Debtor claimed to own the Loan Application Assets when it benefitted him to obtain the loan. Now, however, Debtor disclaims ownership of the Loan Application Assets because it benefits him in his attempt to discharge debt in bankruptcy.

Answer: Defendant admits that he signed the loan application and admits that he does not own the Loan Application Assets. Except as expressly admitted defendant denies the allegations of paragraph 36.

37. Allegation: To the extent that the Soad Wattar Living Trust exists, and the property in the Loan Application is currently owned by the Soad Wattar Living Trust, there is such a unity of interest between Debtor and the Soad Wattar Living Trust that their separate personalities no longer exist, and that there are circumstances such that continuing to recognize their separateness would sanction a fraud or promote injustice.

Answer: Denied.

38. Allegation Plaintiffs are entitled to a declaratory judgment that the Soad Wattar Living Trust is the alter ego of Debtor and that all assets of the trust should be treated as part of Debtor's estate.

Answer: Denied.

Wherefore the debtor defendant asks that the relief requested by the plaintiffs be denied; that the court find that the Soad Wattar Living Trust is not property of the estate; that the debtor be granted his discharge and that judgment be entered in favor the defendant and against the plaintiffs and that the defendant recover his fees and costs.

/s/ William J. Stevens
Attorney for Defendant

William J. Stevens
Illinois ARDC #2731215
Attorney for Richard Sharif

Box 22
Lakeside MI 49116
(269) 469-1469
lawyerbill@qtm.net

Certificate of Service

William J. Stevens hereby certifies that on January 12, 2010 he filed the forgoing answer using the court's ECF/CM system and that in the ordinary course of business the system serves all parties of record by email

/s William J. Stevens

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	No. 09-05868
	)	
RICHARD SHARIF,	)	Hon. Jacqueline P. Cox
	)	
Debtor.	)	Chapter 7
	)	
	)	
	)	
WELLNESS INTERNATIONAL NETWORK, LTD. a/k/a WIN, RALPH OATS, and CATHY OATS,	)	
	)	
Plaintiffs,	)	Adversary No. 09 A 00770
	)	
v.	)	
	)	
RICHARD SHARIF, INDIVIDUALLY AND AS TRUSTEE OF THE SOAD WATAR TRUST,	)	
	)	
Defendant.	)	

MOTION FOR SANCTIONS, COSTS AND FEES, AND, IN THE ALTERNATIVE, MOTION TO COMPEL, MOTION FOR COSTS AND FEES, AND MOTION TO MODIFY SCHEDULING ORDER

Wellness International Network, Ltd., WIN Network, Inc., Ralph Oats, and Cathy Oats (collectively referred to as "Plaintiffs" or "WIN") file this Motion For Sanctions, Costs and Fees, and, in the alternative. Motion to Compel, Motion for Costs and Fees, and Motion to Modify Scheduling Order.

I.
SUMMARY

As this Court is now well aware, this case arises out of a final judgment entered against the bankruptcy debtor Richard Sharif ("Defendant" or "Debtor") and Defendant's inexplicable refusal to comply with his disclosure obligations in the civil litigation in the United States District Court for the Northern District of Texas, in post-judgment collection, and bankruptcy. Defendant has continued to thwart his discovery obligations in yet another forum, and has once again failed and refused to respond to written discovery, and appear for a properly noticed deposition. The discovery deadline has passed in this case. Although Defendant claims that good cause exists for his failure to comply with his discovery obligations, he has not provided any credible evidence or testimony corroborating his claim. As a result, pursuant to Fed. R. Civ. P. 37, Plaintiffs request the Court prohibit Defendant from opposing Plaintiffs' claims, strike Defendant's answer to Plaintiffs Amended Petition, and enter a default

judgment against Defendant in this adversary proceeding. Plaintiffs further request the Court dismiss Defendant's bankruptcy proceeding. Plaintiffs further request the Court award Plaintiffs all of their expenses, including attorneys' fees, incurred. Plaintiffs further request the Court award them their costs and attorneys' fees, in an amount to be proven up by counsel at the hearing, which they were forced to incur to prepare for and attend the deposition, as well as the costs and fees incurred in preparing this motion and attending this hearing.

In the alternative, Plaintiffs request: (1) the Court find that, due to Defendant's failure to timely respond, Defendant has waived any and all objections to Plaintiffs' discovery; (2) the Court order Defendant to physically deliver complete responses to Plaintiffs' written discovery, including documents, to the offices of Gruber Hurst Johansen & Hail, 1445 Ross Ave., Suite 2500, Dallas, Texas 75202, no later than the close of business on April 23, 2010; and (3) the Court order Defendant to appear for deposition on April 30, 2010. Plaintiffs further request the Court order award them their costs and attorneys' fees, in an amount to be proven up by counsel at the hearing, which they were forced to incur to prepare for and attend the deposition, as well as the costs and fees incurred in preparing this motion and attending this hearing. Finally, Plaintiffs request the Court modify the scheduling order [Docket No. 20] and extend the non-expert discovery deadline from April 1, 2010 to May 30, 2010, and extend the dispositive motion deadline from March 30, 2010 to June 15, 2010.

II.
BACKGROUND

A. Dallas Litigation

This case arises out of a final judgment entered against Debtor in the United States District Court for the Northern District of Texas, which resulted, in part, due to Defendant's refusal to comply with his discovery obligations. In late summer/early fall of 2008, Plaintiffs took efforts to collect on the final judgment and served post-judgment discovery on Defendant. The post-judgment discovery requested documents and information relating to assets owned by Defendant, including but not limited to, real property, businesses, bank accounts, retirement accounts and any trusts in which Debtor was a trustee or beneficiary. Defendant completely refused to respond to discovery and refused to comply with Court orders compelling Defendant to provide the requested information. Although the District Court held Defendant in contempt for his failure to provide responsive documents, Defendant never responded to WIN's discovery. Instead of producing the discovery as ordered by the District Court in Dallas, and continuing his evasive attempt to conceal assets, Defendant filed for bankruptcy.[1]

B. Bankruptcy Proceeding

On February 24, 2009, two weeks after being held in contempt, Defendant filed a voluntary petition for

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[1] Plaintiffs incorporate all pleadings filed in Debtor's bankruptcy no. 09-05868 and all evidence attached thereto as if fully set out herein.

relief under Chapter 7 of the Bankruptcy Code. His voluntary petition listed the WIN and the other judgment creditors as creditors.

Realizing that Defendant was not going to voluntarily disclose his assets, WIN pursued efforts to discover Defendant's assets from other sources. Through these efforts, Plaintiffs obtained a loan application that Defendant submitted to Washington Mutual Bank, N.A. dated June 14, 2002 (the "Loan Application"). Defendant, individually, executed the Loan Application under penalty of perjury and unequivocally admitted that he owned the following: (1) three businesses (Logan Square MRI Center; Sharif Pharmacy; and Hermosa Medical Center) valued at $2.4 million; (2) three pieces of real property valued at $1.4 million (4344 N. Clarendon St. #16; 4344 N. Clarendon St. #1602; and 2004 N. Pulaski St.); (3) a retirement account valued at $1.4 million; and (4) three bank accounts at Banco Popular with $180,000 in cash (the "Loan Application Assets"). Based upon these representations, Defendant obtained the loan. The Loan Application and documents relating to the Loan Application Assets were responsive to WIN's post-judgment discovery, subject of the Court's order compelling Defendant to respond to WIN's post-judgment discovery and the contempt proceeding in the United States District Court in Dallas, Texas. Defendant refused to produce these documents.

Defendant has continued to evade his disclosure obligations throughout this bankruptcy proceeding. On March 25, 2009, the parties held the initial Section 341 creditors' meeting. At this meeting, WIN

and the Trustee requested Defendant provide documents related to the Loan Application Assets. The Trustee continued the creditors' meeting until April 21, 2009, to allow Defendant time to gather responsive documents.

On April 21, 2009, the creditors' meeting was continued. Defendant failed to provide any documents evidencing the ownership of the assets in the Loan Application Assets. Again, WIN and the Trustee requested Defendant provide documents related to the property listed in the Bankruptcy Petition and the Loan Application Assets. In an attempt to end the creditors' inquiry into these assets. Defendant claimed that he lied on the Loan Application, and that he did not own any of the Loan Application Assets. Instead, Defendant now claims that this property is owned by the Soad Wattar Living Trust (the "Trust"), which he is trustee. Based upon this claim, WIN and the Trustee also requested documents relating to the Trust. The Trustee continued the creditors' meeting until June 3, 2009, at which time. Defendant failed to provide documents evidencing the transfer or ownership of the Loan Application Assets. Debtor has also failed to provide any documents showing the formation or funding of any trust.

On June 9, 2009, Defendant filed his Motion for Protective Order [Docket No. 23] requesting the Court protect Defendant from having to disclose the information relating to the Loan Application Assets and documents relating to the Trust to WIN. The Court denied this motion. Nevertheless, Defendant has failed to fully comply with his duty of disclosure and to produce responsive documents.

On August 24, 2009, Pursuant to 11 U.S.C. §727, WIN objected to the discharge of Defendant.

On October 20, 2009, the Trustee in the bankruptcy proceeding requested the Court order Defendant to turnover over all documents relating to the ownership and/or transfer of the Loan Application Assets. [Chapter 7 Docket No. 40]. On October 27, 2009, this Court granted the Trustee's request, and ordered Defendant to turn over all documents evidencing any "beneficial, equitable, legal, limited, testamentary, or other interest of the Debtor" in the Loan Application Assets and/or the Trust from 2002 to the present. [Chapter 7 Docket No. 42]. Upon information and belief, Defendant has failed to comply with the Court's order; and the same information that this Court has previously ordered Defendant to turn over in his bankruptcy proceeding.

C. Discovery at Issue

On February 10, 2010, Plaintiffs served Defendant, in both his individual capacity and his capacity as Trustee of the Trust, with requests for production and interrogatories.[2] Defendant's responses to Plaintiffs' written discovery were due on or before March 15, 2010. Defendant failed and refused, and continues to fail and refuse to respond to Plaintiffs' written discovery.

In addition, on February 23, 2010, pursuant to the parties' agreement, Plaintiffs' counsel served

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[2] A true and correct copies of which are attached hereto as Exhibits "A" through "D", and incorporated herein by reference.

Defendant with a deposition notice.[3] On March 24, 2010, Defendant filed his Motion to Extend Time seeking to postpone his deposition, delay his discovery obligations, and derail the Court's scheduling order. [Docket No. 31]. Defendant failed to appear at the deposition.

On April 7, 2010, the Court denied Defendant's Motion to Extend Time. [Docket No. 34].

III.
ARGUMENT & AUTHORITY

As stated above, on February 10, 2010, Plaintiffs served Defendant with written discovery. Defendant's discovery responses were due by March 15, 2010. To date, Defendant has failed to respond to Plaintiffs' discovery. In addition, by agreement Plaintiffs properly noticed Defendant's deposition on March 24, 2010. Defendant failed to attend this deposition.

A. Motion for Sanctions

As a sanction for failure to appear for deposition and failure to respond to written discovery, Rule 37 permits the Court to, *inter alia*: (1) prohibit the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (2) strike pleadings in whole or in part; (3) dismiss the action or proceeding in whole or in part; (4) render default judgment

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[3] A true and correct copy of the Notice of Deposition of Richard Sharif is attached hereto as Exhibit "E," and incorporated herein by reference.

against the disobedient party.[4] In addition to these sanctions, Rule 37 requires the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorneys' fees, caused by the failure, unless the failure is substantially justified.

In this case, Defendant has continued a long history of failing and refusing to comply with any discovery obligations. Plaintiffs' discovery seeks the same information that Judge Boyle ordered Defendant to produce; the same information that Defendant sought to avoid producing by filing this bankruptcy proceeding; the same information that Plaintiff and the Trustee requested Defendant to provide during the Creditor's Meetings; the same information that Defendant asked this Court to provide a protective order to relieve Defendant of his obligation to produce. Defendant has attempted to avoid his discovery obligations, and the discovery deadline has passed.

Due to Defendant's history of discovery abuse, his refusal to comply with his disclosure obligations, and Defendant's indefinite return to the United States, Plaintiffs ask the Court to (1) prohibit Defendant from opposing Plaintiffs' claims; (2) strike Defendant's answer in this adversary proceeding; and (3) render default judgment against Defendant in all capacities.[5] In addition. Plaintiffs request the Court

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[4] Fed. R. Civ. P. 37(b)(2)(A)(ii),(iii),(v), and (vi), 37(d)(1)(A)(i) and (ii), and 37(d)(3).

[5] Fed. R. Civ. P. 37(b)(2)(A)(ii),(iii) and (vi); 37(d)(1)(A)(i) and (ii); and 37(d)(3).

enter an order dismissing Defendant's bankruptcy proceeding.[6] Finally, in addition to these sanctions, Plaintiffs request the Court award Plaintiffs all of their expenses, including attorneys' fees, incurred to prepare for and attend the deposition, as well as the costs and fees incurred in preparing this motion and attending this hearing.

B. In the alternative

1. Motion to Compel and Motion for Costs and Fees

In the alternative, the FEDERAL RULES OF CIVIL PROCEDURE permit a district court to compel responses to discovery if a party does not respond to an interrogatory submitted under FEDERAL RULE OF CIVIL PROCEDURE 33 or respond to a request for production under FEDERAL RULE OF CIVIL PROCEDURE 34.[7] Federal Rules of Civil Procedure 33 and 34 further provide that any ground not stated in a timely objection is waived unless the Court, for good cause, excuses the failure. Defendant failed to provide any response to Plaintiffs written discovery. As a result, Defendant has waived his objections. Plaintiffs request the Court order Defendant to physically deliver complete responses to Plaintiffs' written discovery, including documents, without objection, to the offices of Gruber Hurst Johansen & Hail, 1445 Ross Ave., Suite 2500, Dallas, Texas 75202, no later than the close of business on April 23, 2010.

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[6] Fed. R. Civ. P. 37(b)(2)(A)(v);, 37(d)(1)(A)(i) and (ii); and 37(d)(3).

[7] *See id.*

Plaintiffs further request the Court order Defendant to appear for deposition on May 5, 2010, or at another time if the parties mutually agree, at the offices of Foley & Lardner, LLP, 321 North Clark Street, Suite 2800, Chicago, IL 60654-5313

Under Rule 37(a)(4)(A), Plaintiffs further ask this Court to award Plaintiffs all of their expenses, including attorneys' fees, incurred to prepare for and attend the deposition, as well as the costs and fees incurred in preparing this motion and attending this hearing.

2. Motion to Modify Scheduling Order

As a result of Defendant's dilatory tactics, Plaintiffs further request the Court modify the scheduling order [Docket No. 20] and extend the non-expert discovery deadline from April 1, 2010 to May 30, 2010, and extend the dispositive motion deadline from March 30, 2010 to June 15, 2010.

IV.
PRAYER

For the foregoing reasons, Plaintiffs pray the Court deny Defendant's Motion to Extend Discovery Schedule, and order as follows:

Pursuant to Fed. R. Civ. P. 37, Plaintiffs request the Court:

(1) prohibit Defendant from opposing Plaintiffs claims;

(2) strike Defendant's answer to Plaintiffs Amended Petition;

(3) enter a default judgment against Defendant in all capacities;

(4) dismiss Defendant's bankruptcy proceeding; and

(5) award Plaintiffs all of their expenses, including attorneys' fees, incurred to prepare for and attend the deposition, as well as the costs and fees incurred in preparing this motion and attending this hearing.

In the alternative. Plaintiffs request the Court:

(1) find that, due to Defendant's failure to timely respond, Defendant has waived any and all objections to Plaintiffs' discovery;

(2) order Defendant to physically deliver complete responses to Plaintiffs' written discovery, including documents, to the offices of Gruber Hurst Johansen & Hail, 1445 Ross Ave., Suite 2500, Dallas, Texas 75202, without objections, no later than the close of business on April 23, 2010;

(3) order Defendant shall appear for deposition on May 5, 2010, or at another time if the parties mutually agree, at the offices of Foley & Lardner, LLP, 321 North Clark Street, Suite 2800, Chicago, IL 60654-5313;

(5) award Plaintiffs all of their expenses, including attorneys' fees, incurred to prepare for and attend the deposition, as well as the costs and fees incurred in preparing this motion and attending this hearing;

(6) Plaintiffs further request the Court modify the scheduling order [Docket No. 20] and extend the non-expert discovery deadline from April 1, 2010 to May 30, 2010, and extend the dispositive motion deadline from March 30, 2010 to June 15, 2010; and

(7) Plaintiffs further pray that the Court warn Defendant that a failure to comply with the deadlines set out above may result in contempt, including but not limited to dismissal of Defendant's bankruptcy.

Plaintiffs further pray that the Court award them such other and further relief as they may be entitled.

Respectfully submitted,

By: /s/ Michael J. Lang

Michael J. Lang
Texas Bar No. 24036944
Gruber Hurst Johansen & Hail, LLP
1445 Ross Ave., Suite 2500
Dallas, Texas 75223
Telephone: (214) 855-6806
Facsimile: (214) 855-6808

- *and* -

Gina B. Krol
Cohen & Krol
105 W. Madison Street
Chicago, IL 60602
(312)368-0300

Attorneys for Wellness International Network, Ltd. a/k/a WIN, et al

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that, on this 13th day of April, 2010, he conferred with Defendant's counsel William Stevens about the relief sought in this motion. Defendant's counsel opposed the relief sought in Section III(A). Defendant's counsel could not agree to the relief sought in Section III(B) because he does not know when, or if Defendant will return to this country. Finally, Defendant's counsel does not oppose amending the Court's Scheduling Order.

/s/ Michael J. Lang
Michael J. Lang

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 14th day of April, 2010, this document was filed electronically in compliance with the Notice of Mandatory Electronic Filing and all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system.

/s/ Michael J. Lang
Michael J. Lang

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	No. 09-05868
	)	
RICHARD SHARIF,	)	Hon. Jacqueline P. Cox
	)	
Debtor.	)	Chapter 7
	)	
	)	
WELLNESS INTERNATIONAL NETWORK, LTD. a/k/a WIN, RALPH OATS, and CATHY OATS,	)	
	)	
Plaintiffs,	)	Adversary No. 09 A 00770
	)	
v.	)	
	)	
RICHARD SHARIF, INDIVIDUALLY AND AS TRUSTEE OF THE SOAD WATTAR TRUST,	)	
	)	
Defendant.	)	

PLAINTIFFS' FIRST INTERROGATORIES TO DEFENDANT

TO: Plaintiff Richard Sharif by and through his attorney of record, William J. Stevens, P.O. Box 22, Lakeside, Michigan 49116.

Pursuant to FEDERAL RULE OF CIVIL PROCEDURE 33, you are to answer the attached interrogatories separately, fully, in writing, and under oath. You should deliver a true copy of your answers to the undersigned attorney within thirty days after the date of service of these interrogatories.

Respectfully submitted,

By: /s/ Michael J. Lang
Michael J. Lang
Texas Bar No. 24036944
Gruber Hurst Johansen & Hail, LLP
1445 Ross Ave., Suite 2500
Dallas, Texas 75223
Telephone: (214) 855-6806
Facsimile: (214) 855-6808

- *and* -

Gina B. Krol
Cohen & Krol
105 W. Madison Street
Chicago, IL 60602
(312) 368-0300

Attorneys for Wellness International Network, Ltd. a/k/a WIN, et al

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 10th day of February, 2010, in being served on all counsel of record in accordance with the Federal Rules of Civil Procedure.

/s/ Michael J. Lang
Michael J. Lang

DEFINITIONS AND INSTRUCTIONS

1. For any material or information claimed to be privileged, you must state that information or material has been withheld, the request to which the information or material relates, and the privilege or privileges asserted,

2. To the extent provided by the Federal Rules of Civil Procedure, these discovery requests are intended to be continuing in nature. You are required to supplement your answers when appropriate or necessary.

3. Wherever the words "and" or "or" appear, the meaning intended is always "and/or."

4. The plural includes the singular and vice versa.

5. "Richard Sharif," or "you" or the "Defendant" shall mean Richard Sharif, individually, your heirs, assigns, affiliates, present or former, employees, agents and representatives, as well as all other persons who at any time acted or purported to act on behalf of Richard Sharif.

6. "Plaintiffs" shall mean Wellness International Network, Ltd., WIN Network, Inc., Ralph Oats, Cathy Oats, and Sheri Matthews.

7. "Exhibit A" shall mean the Master Loan Application date June 14, 2002, attached hereto.

8. The term "third parties" means any person or entity that is not a party to this action and is not employed or retained by a party to this action.

9. Unless otherwise specified, the relevant time period for these requests is January 1, 2002 to the present.

10. "Document" means the definition ascribed to "designated documents" under FED. R. CIV. P. 34(a). A draft or non-identical copy is a separate document within the meaning of this term.

INTERROGATORIES

1. Describe in detail all facts evidencing the ownership, in whole or in part, (including any transfers of ownership) of following assets listed on Exhibit A from 2002 to the present:

   a. Logan Square MRI Center;

      Answer:

   b. Sharif Pharmacy;

      Answer:

   c. Hermosa Medical Center;

      Answer:

   d. Banco Popular account valued at $90,000;

      Answer:

   e. Banco Popular account valued at $40,000;

      Answer:

   f. Banco Popular account valued at $50,000;

      Answer:

   g. Retirement fund/401k valued at $1,400,000;

      Answer:

h. the real property located at 4344 N. Clarendon St. valued at a collective $400,000;

Answer:

i. the real property located at 2004 N. Pulaski valued at $1,000,000.

Answer:

2. For each business listed on Exhibit A (Logan Square MRI Center, Sharif Pharmacy, Hermosa Medical Center), identify the following;

   a. The full name of the business.

   b. The complete address of the principal place of business or general office of the business.

   c. The complete address of each place at which it conducts business.

   d. The type of business it conducts.

   e. The form of business organization.

   f. Your duties in the business.

   g. The full name and complete address of each person who has ever been a shareholder, partner, officer, and director of the business,

3. Identify Soad Wattar's current address, and address for each year since 2002.

4. Identify whether Soad Wattar has ever been to the United States, and if so, when is the last time she was in the United State

5. Identify each ownership interest in, option to purchase, contract to sell, leasehold in, or other interest that you hold or have held in any real property. Identify shall include, but not be limited to the following:

   a. The legal and common descriptions and the location of the property.

   b. The size of the property.

   c. The full name and complete address of each person or other entity having an interest in it.

   d. The ownership of the property as stated in the title documents and the location of each document.

   e. The present value of your equity interest in the property.

   f. The amount paid for the property.

   g. If any real property that you now own, claim any interest in, or have title to is encumbered by a mortgage, security interest, or other kind of lien, state:

      (1) A complete description of the item, including has applicable) the year, make, model, serial number, and other permanent identification numbers.

      (2) The nature of the encumbrance.

      (3) The date the property was encumbered.

(4) The full name and complete address of each person or entity holding the encumbrance.

(5) The payment or other consideration received for the encumbrance.

(6) The full name and complete address of each person or entity who paid the consideration.

h. If you hold the property in trust for any person or entity, state:

(1) A complete description of the property held in trust.

(2) The complete address of the property's location.

(3) The date the trust was created.

(4) The source of the trust assets.

(5) The full name and complete address of each beneficiary who has an interest in the trust.

6. Identify all real or personal property that you have disposed of by sale, gift, or other action, since 2002. Identify shall include, but not be limited to the following:

a. A full description of the property disposed of.

b. The date of the disposition.

c. The full name and complete address of each person or entity to whom disposition was made.

d. The payment or other consideration received in exchange.

e. The manner of disposition (gift, sale, etc.).

f. The date you acquired the property.

g. The estimated market value of the property when the corporation acquired it.

h. The complete address of the property's present location.

i. If you made any such disposition (by conveyance, transfer, gift, or otherwise) of property with any reservation of rights, benefits, or options for the reacquisition of the property at some future date, state:

(1) A full description of the property involved.

(2) The date of the disposition.

(3) The transferee's full name and complete address.

(4) The nature of the reservation, benefit, or option.

7. Identify all property, for which you have given consideration, that has been conveyed or transferred since 2002 and is now being held for you in the name of some person or other entity. Identify shall include, but not be limited to the following:

a. The full name and complete address of each title holder.

b. The date the conveyance or transfer was made.

c. A complete description of each item of property involved.

d. The amount of payment or consideration given for the property.

8. Identify all money, real property, or other personal property belonging wholly or partly to you that, since 2002, has been transferred to--or is it in the possession of--any present or former wife, relative (by blood or marriage), friend, or acquaintance of any of them. Identify shall include, but not be limited to the following:

a. A complete description of the transaction.

b. A complete description of the property involved.

c. The full name and complete address of each person involved.

d. The payment or other consideration the corporation received in exchange.

9. Identify each account at any bank or other financial or lending institution, in which you have check-writing authority. Identify shall include, but not be limited to the following:

a. Where the account is maintained.

b. The full name and number under which the account is maintained.

c. The full name and complete address of the institution holding the account.

d. The full name and complete address of each person or entity owning or claiming an interest in it.

e. The reason for the corporation's authority to write checks on the account.

10. For each expense of yours that recurs on a monthly or other regular basis and exceeds $500, please state

a. A complete description of the debt or expense.

b. The amount of each payment and either (1) that this amount is the same for each payment or (2) that this amount is an average for the past year.

c. The full name and complete address of the recipient of the payments.

d. Whether each debt is paid.

e. The manner of payment (cash payment, transfer of inventory, etc.).

f. If the debt is paid in cash, the full name and complete address of the source from which the cash is obtained.

g. The date it was paid.

11. Identify each trust for the benefit of others that you have created or contributed to in the last five years. Identify shall include, but not be limited to the following:

a. The date the trust was created

b. A complete description of the property contributed to the trust by the corporation and the property's present market value.

c. Each trustee's full name and complete address.

d. Each beneficiary's full name and complete address.

e. Whether any of the beneficiaries are related to each other and, if they are, the full names of the related beneficiaries and the nature of their relationship.

12. Identify any real or personal property held in trust for you by any person or entity. Identify shall include, but not be limited to the following:

a. A complete description of the property held in trust.

b. The complete address of the property's location.

c. The date the trust was created.

d. The source of the trust assets.

e. The full name and complete address of each beneficiary of the trust.

13. Identify any will under which you are a beneficiary. Identify shall include, but not be limited to the following:

a. The full name of the testator or testatrix.

b. A complete description of the property given to the corporation under the will.

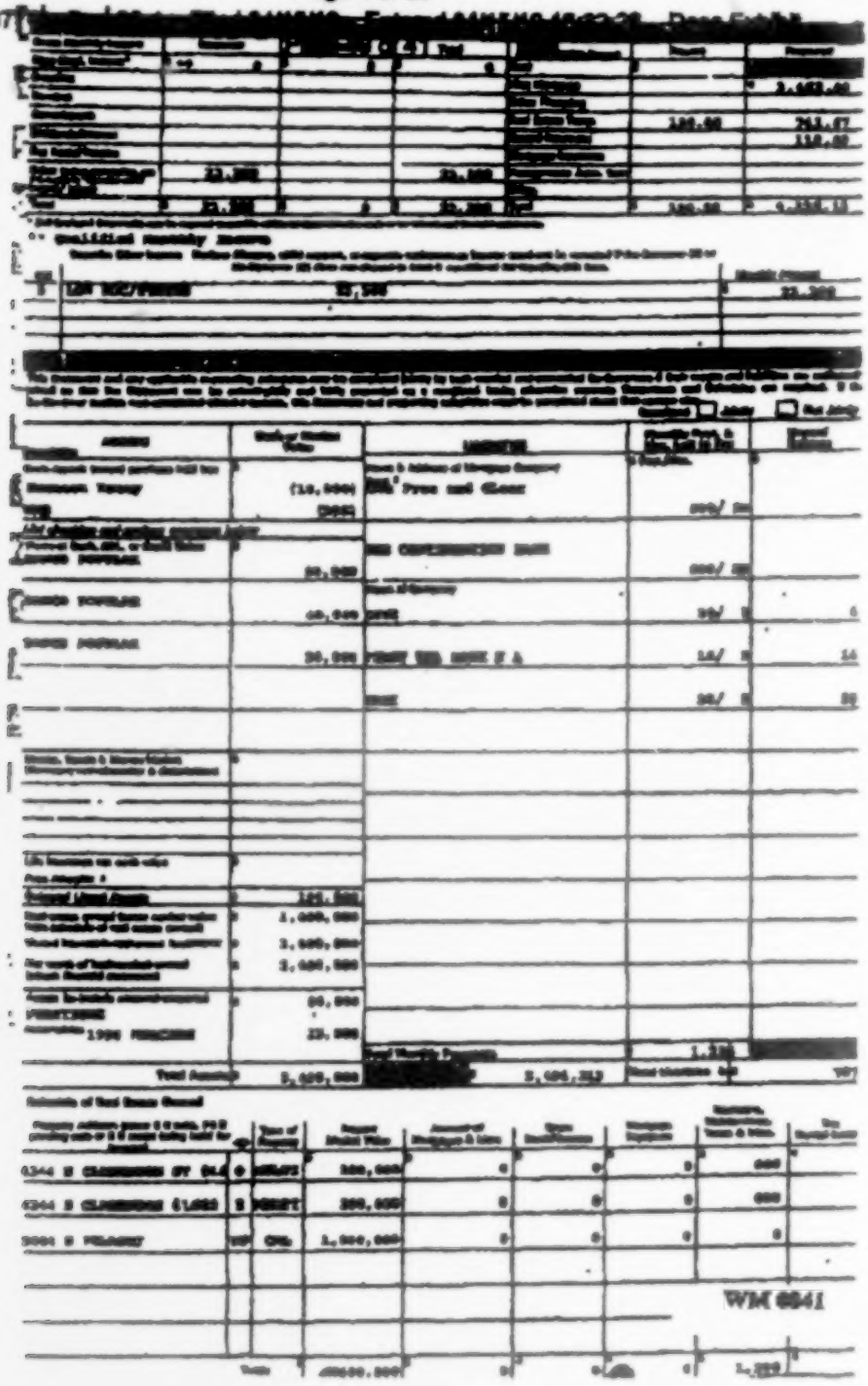
c. The name, number, and location of the court administering the estate.

d. If the will has not been offered for probate, the full name and complete address of the person who now has possession of the will.

e. Whether you have received any advancement from the testator, testatrix, or personal representative and, if so, the amount of each advancement received.

f. Whether you have renounced any bequest or legacy and, if so, the date of each renunciation and the full name and complete address of each person or entity whose interest in the estate was enhanced as a result of the renunciation.

EXHIBIT
A



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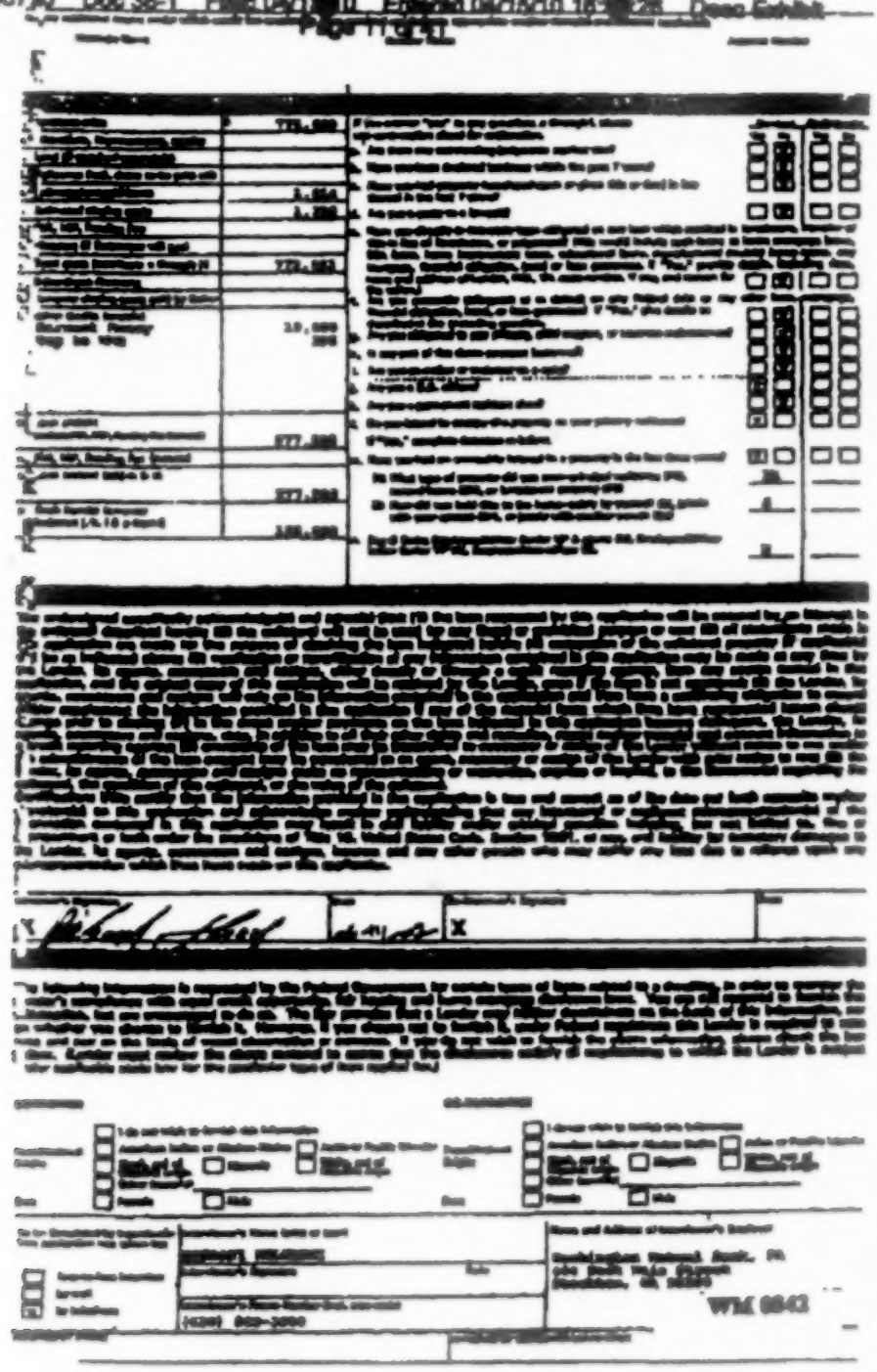


EXHIBIT B

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	No. 09-05868
	)	
RICHARD SHARIF,	)	Hon. Jacqueline P. Cox
	)	
Debtor.	)	Chapter 7
	)	
	)	
WELLNESS INTERNATIONAL NETWORK, LTD. a/k/a WIN, RALPH OATS, and CATHY OATS,	)	
	)	
Plaintiffs,	)	Adversary No. 09 A 00770
	)	
v.	)	
	)	
RICHARD SHARIF, INDIVIDUALLY AND AS TRUSTEE OF THE SOAD WATAR TRUST,	)	
	)	
Defendant.	)	

PLAINTIFFS' FIRST REQUEST FOR PRODUCTION TO DEFENDANT

TO: Plaintiff Richard Sharif by and through his attorney of record, William J. Stevens, P.O. Box 22, Lakeside, Michigan 49116.

Pursuant to FED. R. CIV. P. 34 Plaintiffs Wellness International Network, Ltd. a/k/a WIN, *et al.* hereby requests Defendant Richard Sharif, individually, to produce and permit the inspection and copying of the documents requested herein. The documents requested shall be produced within thirty (30) days after the service of this Request for Production.

Respectfully submitted,

By: /s/ Michael J. Lang
Michael J. Lang
Texas Bar No. 24036944
Gruber Hurst Johansen & Hail, LLP
1445 Ross Ave., Suite 2500
Dallas, Texas 75223
Telephone: (214) 855-6806
Facsimile: (214) 855-6808

- *and* -

Gina B. Krol
Cohen & Krol
105 W. Madison Street
Chicago, IL 60602
(312) 368-0300

Attorneys for Wellness International Network, Ltd. a/k/a WIN, et al

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 10th day of February, 2010, in being served on all counsel of record in accordance with the Federal Rules of Civil Procedure.

/s/ Michael J. Lang
Michael J. Lang

DEFINITIONS AND INSTRUCTIONS

1. For any material or information claimed to be privileged, you must state that information or material has been withheld, the request to which the information or material relates, and the privilege or privileges asserted.

2. To the extent provided by the FEDERAL RULES OF CIVIL PROCEDURE, these discovery requests are intended to be continuing in nature. You are required to supplement your answers when appropriate or necessary.

3. Wherever the words "and" or "or" appear, the meaning intended is always "and/or."

4. The plural includes the singular and vice versa.

5. "Richard Sharif," or "you" or the 'Defendant" shall mean Richard Sharif, individually, your heirs, assigns, affiliates, present or former, employees, agents and representatives, as well as all other persons who at any time acted or purported to act on behalf of Richard Sharif.

6. "Plaintiffs" shall mean Wellness International Network, Ltd., WIN Network, Inc., Ralph Oats, Cathy Oats, and Sheri Matthews.

7. "Exhibit A" shall mean the Master Loan Application date June 14, 2002, attached hereto.

8. The term "third parties" means any person or entity that is not a party to this action and is not employed or retained by a party to this action.

9. Unless otherwise specified, the relevant time period for these requests is January 1, 2002 to the present.

10. "Document" means the definition ascribed to "designated documents" under FED. R. CIV. P. 34(a). A draft or non-identical copy is a separate document within the meaning of this term.

11. "Electronic or magnetic data" refers to data or information that exists in electronic or magnetic form. Defendants request that Plaintiff produce all responsive electronic or magnetic data in the form that such data or information is originally contained or a copy in the form that such data or information is originally contained. If it is not reasonably feasible to produce such data or information in its original form or in a copy of its original form, then Defendants will accept such information on CD-ROM or DVD-ROM.

12. "Plaintiffs" shall mean all plaintiffs in this action.

DOCUMENTS REQUESTED

1. The "five hundred ninety two pages of documents generated during defendant's dealings with Washington Mutual N.A. marked as WM0002 – WM0593 during defendant's divorce litigation" that are referenced in Defendant's Initial Disclosures.

2. All correspondence between Defendant and Washington Mutual N.A. that relate to Exhibit A.

3. All "copies of checks drawn by Soad Wattar on her AG Edwards account to pay the Washington

Mutual Loan and other expenses" that are referenced in Defendant's Initial Disclosures.

4. All copies of checks drawn by Defendant on Soad Wattar's AG Edwards account.

5. All documents that relate or refer to any mortgage on the property located at 36 Rever Drive, South Barrington, Il 60010.

6. All corporate documents for Logan Square MRI & Diagnostic Center Inc., including but not limited to the Bylaws, any amendments thereto, and minutes from July 31, 1999 to the present.

7. All corporate documents for Sharif Pharmacy, Inc., including but not limited to the Bylaws, any amendments thereto, and minutes from 1992 to the present.

8. All corporate documents for Hermosa Medical Center, including but not limited to the Bylaws, any amendments thereto, and minutes from 1992 to the present.

9. All "documents relating to 36 Revere Drive, South Barrington, Illinois" that are referenced in Defendant's Initial Disclosures.

10. All "Federal and Illinois Tax returns for the Soad Wattar Living Trust," including schedules, that are referenced in Defendant's Initial Disclosures.

11. All "documents relating to the Soad Wattar Living Trust" that are referenced in Defendant's Initial Disclosures.

12. All "real estate and land trust documents relating to 4344 N. Caredon" that are referenced in Defendant's Initial Disclosures.

13. All documents evidencing the ownership interest in any real property located at 4344 N. Clarendon St. from 2002 to the present.

14. All documents evidencing the ownership interest in any real property located at 2004 N. Pulaski St. from 2002 to the present.

15. All documents evidencing the ownership interest in the "retirement fund/401k" valued at $1.4 million and identified in Exhibit A.

16. All documents evidencing the value of the "retirement fund/401k" identified in Exhibit A, from 2002 to the present.

17. All documents evidencing the ownership in the Banco Popular account valued at $90,000, identified in Exhibit A, from 2002 to the present.

18. All documents evidencing the value of the Banco Popular account valued at $90,000, identified in Exhibit A, from 2002 to the present.

19. All documents evidencing the ownership in the Banco Popular account valued at $40,000, identified in Exhibit A.

20. All documents evidencing the value of the Banco Popular account valued at $40,000, identified in Exhibit A., from 2002 to the present.

21. All documents evidencing the ownership in the Banco Popular account valued at $50,000, identified in Exhibit A.

22. All documents evidencing the value of the Banco Popular account valued at $50,000, identified in Exhibit A., from 2002 to the present.

23. All "documents relating to the Wellness claim for attorney's fees" referenced in Defendant's Initial Disclosures.

24. All Federal and State income tax returns, with schedules, filed by the Defendant from 2002 to the present.

25. All documents specifically referenced in any of the State and Federal income tax returns filed by the Defendant from 2002 to present.

26. All documents that specifically reference any and all books, records, or other memoranda of business or financial conduct, activities, status or income of the Defendant from 2002 to the present.

27. All documents specifically referencing all deeds, records, titles or other documents that relate to assets in the name of the Defendant from 2002 to the present.

28. All documents specifically referencing any records of salaries, commissions, bonuses, income from employment, allowances, expenses, or any other sums of money paid to the Defendant from 2002 to the present.

29. All documents specifically referencing the name(s) and address(es) of the person or persons who have custody of records of salaries, commissions, bonuses, allowances, expenses or

any other sums of money paid to the Defendant from 2002 to the present.

30. All documents, items, and things specifically referencing any and all accounts in which the Defendant has an interest or has had an interest from 2002 to the present.

31. All documents specifically referencing the name and address of persons or entities to whom the Defendant has given a financial statement from 2002 to the present.

32. All documents specifically referencing financial statements prepared by the Defendant from 2002 to the present.

33. All documents specifically referencing each person or entity to whom the Defendant has paid, given, or conveyed any real property or business interest from 2002 to the present.

34. All documents specifically referencing or evidencing any debt owed by the Defendant to Haifa Kaj.

35. All documents specifically referencing or evidencing any debt owed by the Defendant to Jamal Sharifeh.

36. All documents specifically referencing or evidencing any debt owed by the Defendant to Ragda Sharif.

37. All documents specifically referencing or evidencing any debt owed by the Defendant to Soad Wattar.

38. All documents specifically referencing or evidencing shares of stock owned by the Defendant or in which the Defendant claims an interest.

39. All certificates of or shares of stock owned by the Defendant, including treasury stock.

40. All documents specifically referencing or evidencing any interest the Defendant may have in any businesses, partnerships, corporations, or joint ventures.

41. All documents specifically referencing or evidencing mortgage(s) upon which the Defendant is liable.

42. All documents specifically referencing or evidencing any assets held in trust, in an estate, or in any other name or capacity in which the Defendant claims or has an interest.

43. All documents evidencing any power of attorney under which you are the designated agent.

44. All documents evidencing any account at any financial institution in which Defendant is a designated signatory.

45. All documents evidencing any beneficial, equitable, legal, or other interests in or loans or extensions of capital or credit to Logan Square MRI Center at any time from 2002 to the present.

46. All documents evidencing any beneficial, equitable, legal, or other interests in or loans or

extensions of capital or credit to Sharif Pharmacy at any time from 2002 to the present.

47. All documents evidencing any beneficial, equitable, legal, or other interests in or loans or extensions of capital or credit to Hermosa Medical Center at any time from 2002 to the present.

48. All documents evidencing any beneficial, equitable, legal, legal, limited, testamentary, or other interests of Defendant in any realty at any time in 2002 to the present.

49. All documents evidencing any beneficial, equitable, legal, or other interest of the Defendant in any automatic transfer service, checking, demand deposit, money market, negotiable order of withdrawal, passbook, savings, time deposit, or trust account at any time from 2002 to the present.

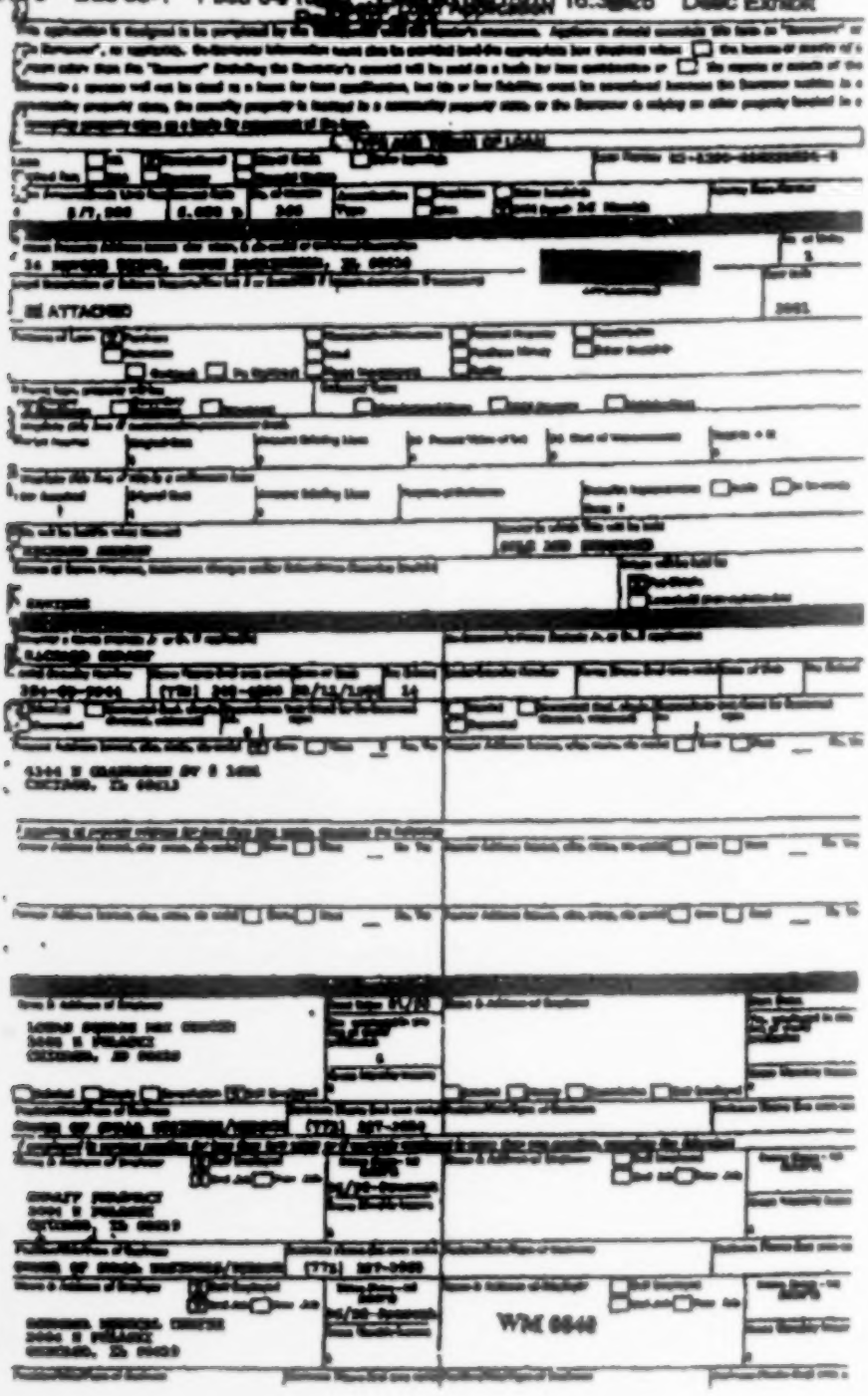
50. The Soad Wattar Living Trust, and any other testamentary instrument of any nature that bears the "Soad" or "Watter" in its name or that bequeathed, conveyed, delivered, devised, extended, funded, paid, or tendered any value to, or received any value at any time from, either Soad Wattar or the Soad Wattar Living Trust.

51. All document evidencing each use of funds from the Soad Wattar Living Trust by you.

52. All documents evidencing each distribution of funds from the Soad Wattar Living Trust to you.

53. All documents evidencing each asset, including real property, purchased by you with funds from the Soad Wattar Living Trust.

54. All documents evidencing the use by you or distribution to you of any proceeds received from each investment made with funds from the Soad Wattar Living Trust.



EXHIBIT

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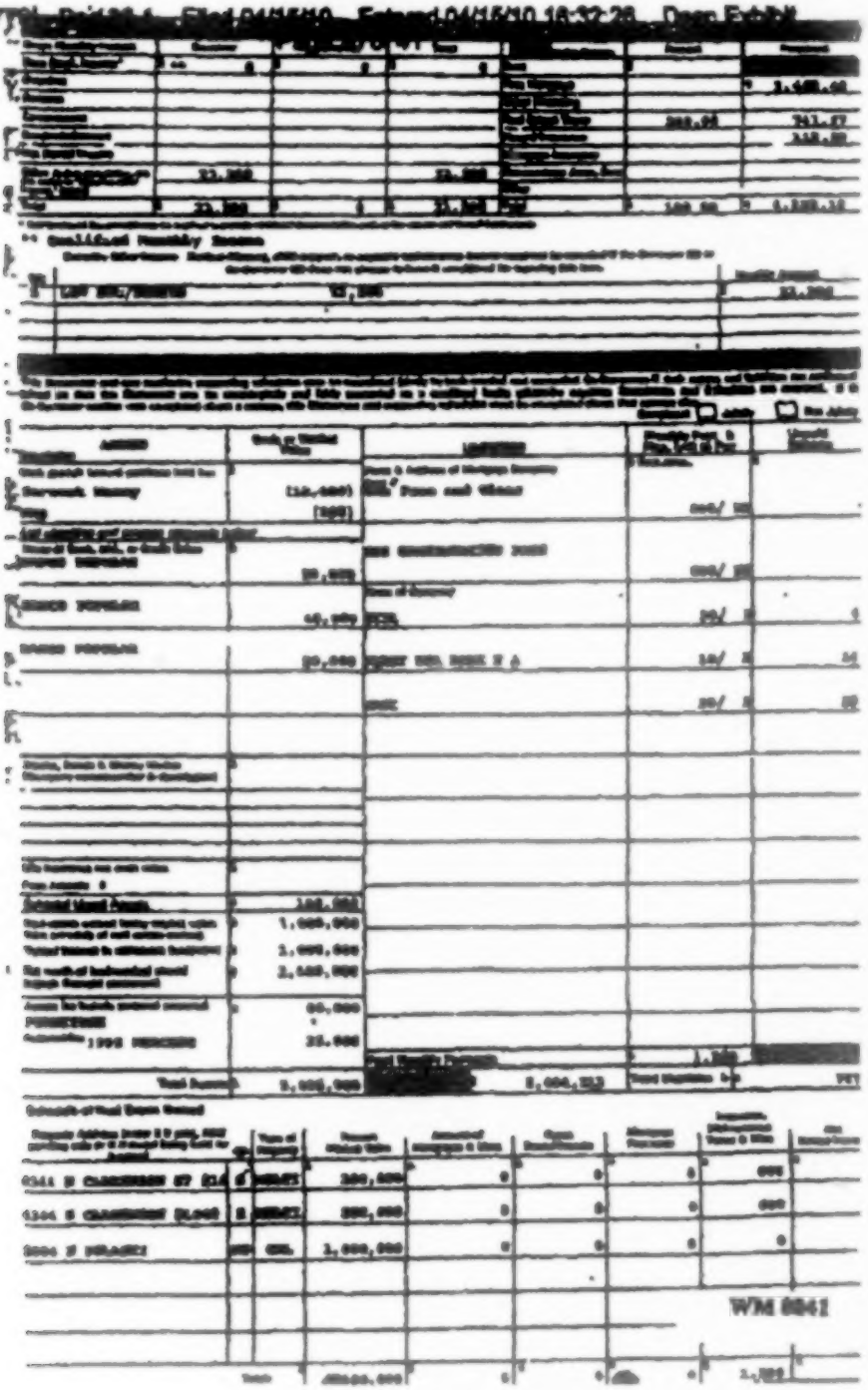

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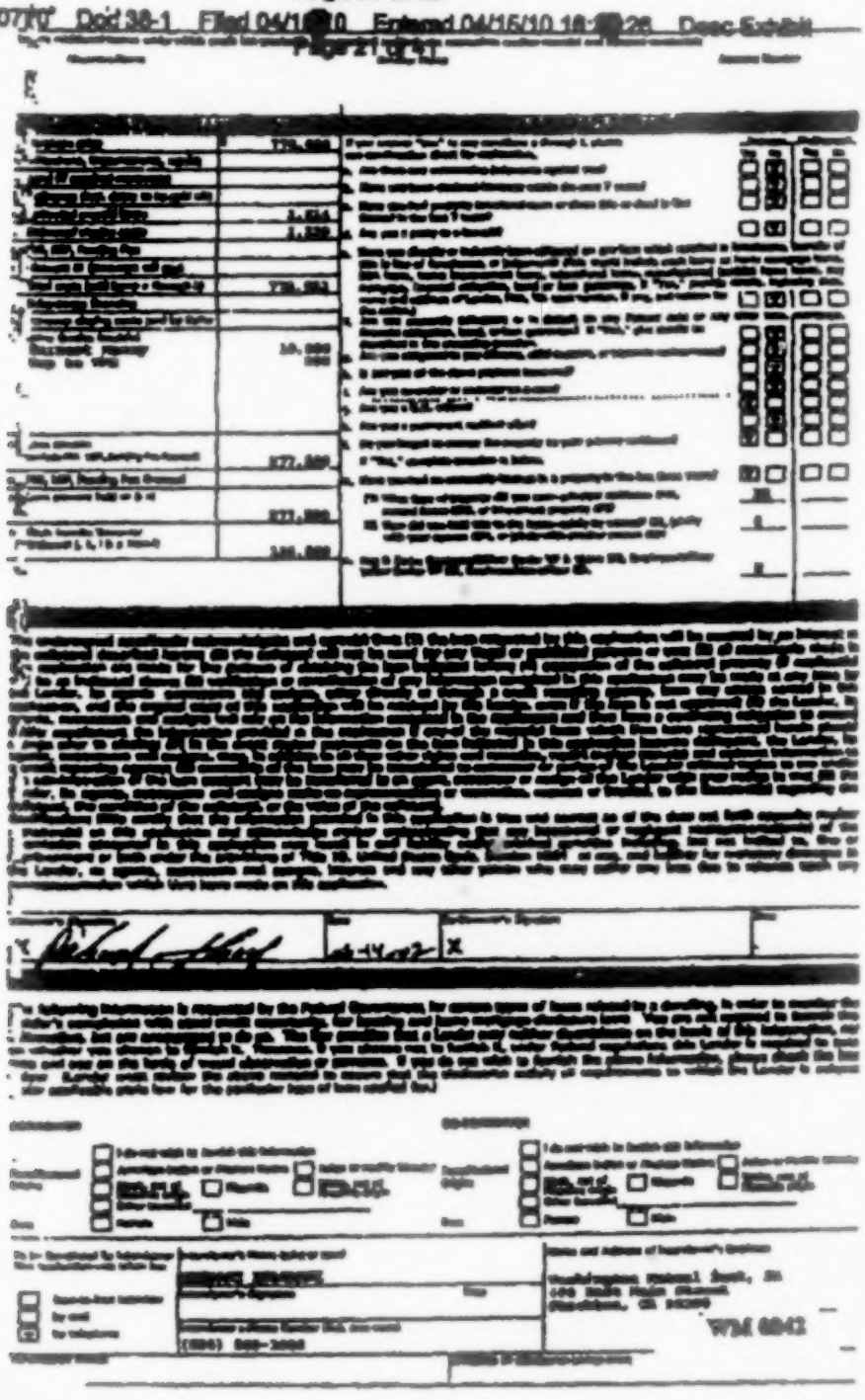


EXHIBIT C

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	No. 09-05868
	)	
RICHARD SHARIF,	)	Hon. Jacqueline P. Cox
Debtor.	)	Chapter 7
	)	
	)	
WELLNESS INTERNATIONAL NETWORK, LTD. a/k/a WIN, RALPH OATS, and CATHY OATS,	)	
	)	
Plaintiffs,	)	Adversary No. 09 A 00770
v.	)	
	)	
RICHARD SHARIF, INDIVIDUALLY AND AS TRUSTEE OF THE SOAD WATTAR TRUST,	)	
	)	
Defendant.	)	

PLAINTIFFS' FIRST INTERROGATORIES TO DEFENDANT AS TRUSTEE OF THE SOAD WATTAR LIVING TRUST

TO: Plaintiff Richard Sharif, as Trustee of the Soad Wattar Living Trust, by and through his

attorney of record, William J. Stevens, P.O. Box 22, Lakeside, Michigan 49116.

Pursuant to FEDERAL RULE OF CIVIL PROCEDURE 33, you are to answer the attached interrogatories separately, fully, in writing, and under oath. You should deliver a true copy of your answers to the undersigned attorney within thirty days after the date of service of these interrogatories.

Respectfully submitted,

By: /s/ Michael J. Lang

Michael J. Lang
Texas Bar No. 24036944
Gruber Hurst Johansen & Hail, LLP
1445 Ross Ave., Suite 2500
Dallas, Texas 75223
Telephone: (214) 855-6806
Facsimile: (214) 855-6808

- *and* -

Gina B. Krol
Cohen & Krol
105 W. Madison Street
Chicago, IL 60602
(312) 368-0300

Attorneys for Wellness International Network, Ltd. a/k/a WIN, et al

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 10th day of February, 2010, in being served on all counsel of record in accordance with the Federal Rules of Civil Procedure.

/s/ Michael J. Lang
Michael J. Lang

DEFINITIONS AND INSTRUCTIONS

1. For any material or information claimed to be privileged, you must state that information or material has been withheld, the request to which the information or material relates, and the privilege or privileges asserted,

2. To the extent provided by the FEDERAL RULES OF CIVIL PROCEDURE, these discovery requests are intended to be continuing in nature. You are required to supplement your answers when appropriate or necessary.

3. Wherever the words "and" or "or" appear, the meaning intended is always "and/or."

4. The plural includes the singular and vice versa.

5. "Richard Sharif," or "you" or the "Defendant" shall mean Richard Sharif, as Trustee of the Soad Wattar Living Trust, its beneficiaries, assigns, affiliates, present or former, employees, agents and representatives, as well as all other persons who at any time acted or purported to act on behalf of Richard Sharif.

6. "Plaintiffs" shall mean Wellness International Network, Ltd., WIN Network, Inc., Ralph Oats, Cathy Oats, and Sheri Matthews.

7. "Exhibit A" shall mean the Master Loan Application date June 14, 2002, attached hereto.

8. The term "third parties" means any person or entity that is not a party to this action and is not employed or retained by a party to this action.

9. Unless otherwise specified, the relevant time period for these requests is January 1, 2002 to the present.

10. "Document" means the definition ascribed to "designated documents" under FED R. CIV. P. 34(a). A draft or non-identical copy is a separate document within the meaning of this term.

INTERROGATORIES

1. Describe in detail all facts evidencing the ownership, in whole or in part, (including any transfers of ownership) of following assets listed on Exhibit A from 2002 to the present:

   a. Logan Square MRI Center;

   Answer:

   b. Sharif Pharmacy;

   Answer:

   c. Hermosa Medical Center;

   Answer:

   d. Banco Popular account valued at $90,000;

   Answer:

   e. Banco Popular account valued at $40,000;

   Answer:

   f. Banco Popular account valued at $50,000;

   Answer:

   g. Retirement fund/401k valued at $1,400,000;

   Answer:

h. the real property located at 4344 N. Clarendon St. valued at a collective $400,000;

Answer:

i. the real property located at 2004 N. Pulaski valued at $1,000,000.

Answer:

2. For each business listed on Exhibit A (Logan Square MRI Center, Sharif Pharmacy, Hermosa Medical Center), identify the following;

   a. The full name of the business.

   b. The complete address of the principal place of business or general office of the business.

   c. The complete address of each place at which it conducts business.

   d. The type of business it conducts.

   e. The form of business organization.

   f. Your duties in the business.

   g. The full name and complete address of each person who has ever been a shareholder, partner, officer, and director of the business,

3. Identify Soad Wattar's current address, and address for each year since 2002.

4. Identify whether Soad Wattar has ever been to the United States, and if so, when is the last time she was in the United State

5. Identify each ownership interest in, option to purchase, contract to sell, leasehold in, or other interest that you hold or have held in any real property. Identify shall include, but not be limited to the following:

   a. The legal and common descriptions and the location of the property.

   b. The size of the property.

   c. The full name and complete address of each person or other entity having an interest in it.

   d. The ownership of the property as stated in the title documents and the location of each document.

   e. The present value of your equity interest in the property.

   f. The amount paid for the property.

   g. If any real property that you now own, claim any interest in, or have title to is encumbered by a mortgage, security interest, or other kind of lien, state:

      (1) A complete description of the item, including has applicable) the year, make, model, serial number, and other permanent identification numbers.

      (2) The nature of the encumbrance.

      (3) The date the property was encumbered.

(4) The full name and complete address of each person or entity holding the encumbrance.

(5) The payment or other consideration received for the encumbrance.

(6) The full name and complete address of each person or entity who paid the consideration.

h. If you hold the property in trust for any person or entity, state:

(1) A complete description of the property held in trust.

(2) The complete address of the property's location.

(3) The date the trust was created.

(4) The source of the trust assets.

(5) The full name and complete address of each beneficiary who has an interest in the trust.

6. Identify all real or personal property that you have disposed of by sale, gift, or other action, since 2002. Identify shall include, but not be limited to the following:

a. A full description of the property disposed of.

b. The date of the disposition.

c. The full name and complete address of each person or entity to whom disposition was made.

d. The payment or other consideration received in exchange.

e. The manner of disposition (gift, sale, etc.).

f. The date you acquired the property.

g. The estimated market value of the property when the corporation acquired it.

h. The complete address of the property's present location.

i. If you made any such disposition (by conveyance, transfer, gift, or otherwise) of property with any reservation of rights, benefits, or options for the reacquisition of the property at some future date, state:

(1) A full description of the property involved.

(2) The date of the disposition.

(3) The transferee's full name and complete address.

(4) The nature of the reservation, benefit, or option.

7. Identify all property, for which you have given consideration, that has been conveyed or transferred since 2002 and is now being held for you in the name of some person or other entity. Identify shall include, but not be limited to the following:

a. The full name and complete address of each title holder.

b. The date the conveyance or transfer was made.

c. A complete description of each item of property involved.

d. The amount of payment or consideration given for the property.

8. Identify all money, real property, or other personal property belonging wholly or partly to you that, since 2002, has been transferred. Identify shall include, but not be limited to the following:

a. A complete description of the transaction.

b. A complete description of the property involved.

c. The full name and complete address of each person involved.

d. The payment or other consideration the corporation received in exchange.

9. Identify each account at any bank or other financial or lending institution, in which you have check-writing authority. Identify shall include, but not be limited to the following:

a. Where the account is maintained.

b. The full name and number under which the account is maintained.

c. The full name and complete address of the institution holding the account.

d. The full name and complete address of each person or entity owning or claiming an interest in it.

e. The reason for the corporation's authority to write checks on the account.

10. For each expense of the Trust, including compensation to the Trustee, whether in form of salary or fees, that recurs on a monthly or other regular basis and exceeds $500, please state:

a. A complete description of the expense.

b. The amount of each payment and either (1) that this amount is the same for each payment or (2) that this amount is an average for the past year.

c. The full name and complete address of the recipient of the payments.

d. The manner of payment (cash payment, transfer of inventory, etc.).

e. If the debt is paid in cash, the full name and complete address of the source from which the cash is obtained.

11. Identify each trust for the benefit of others that you have created or contributed to in the last five years. Identify shall include, but not be limited to the following:

a. The date the trust was created

b. A complete description of the property contributed to the trust by the corporation and the property's present market value.

c. Each trustee's full name and complete address.

d. Each beneficiary's full name and complete address.

e. Whether any of the beneficiaries are related to each other and, if they are, the full names of the related beneficiaries and the nature of their relationship.

12. Identify any real or personal property held in trust for you by any person or entity. Identify shall include, but not be limited to the following:

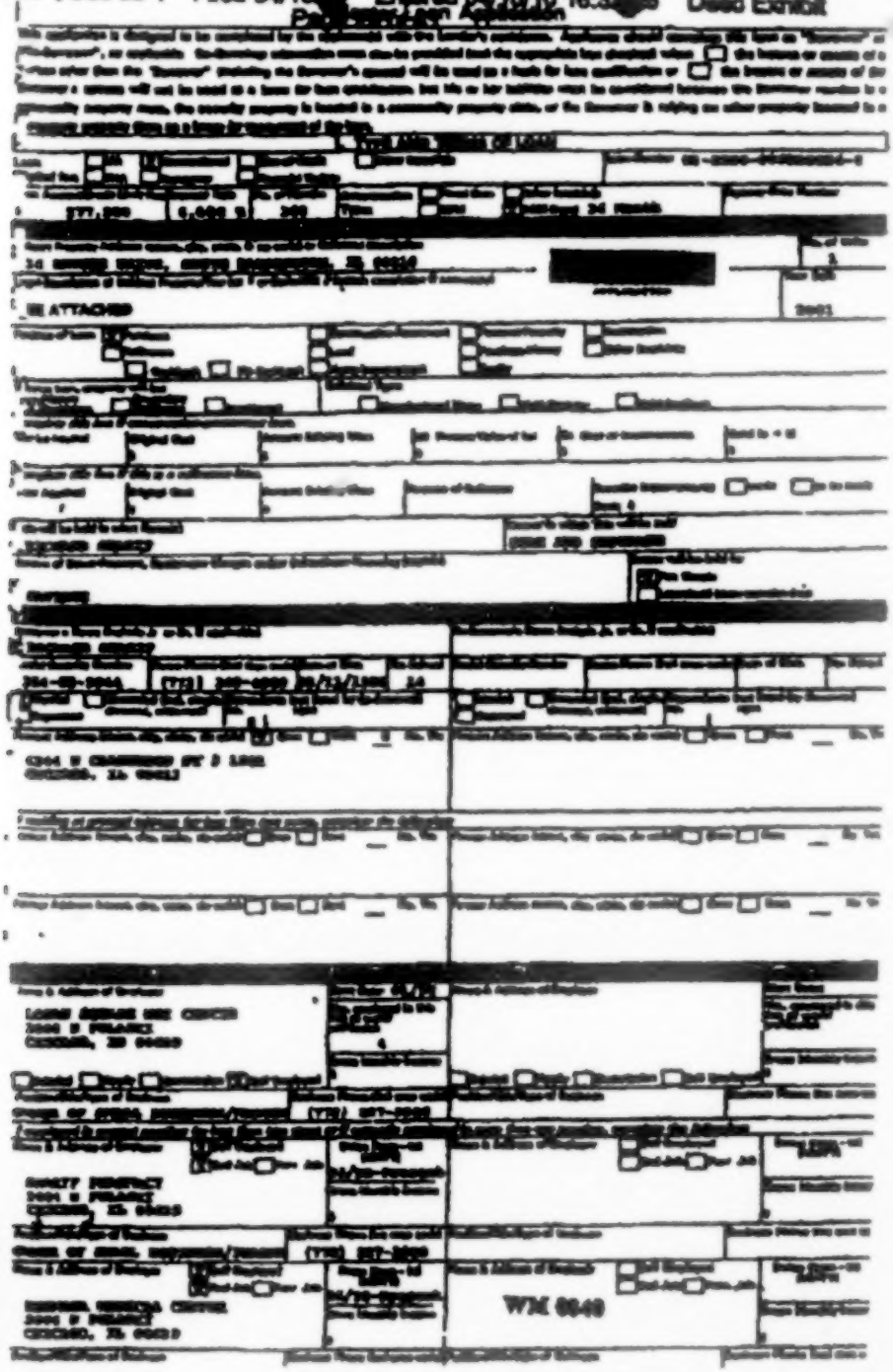
a. A complete description of the property held in trust.

b. The complete address of the property's location.

c. The date the trust was created.

d. The source of the trust assets.

e. The full name and complete address of each beneficiary of the trust.



EXHIBIT
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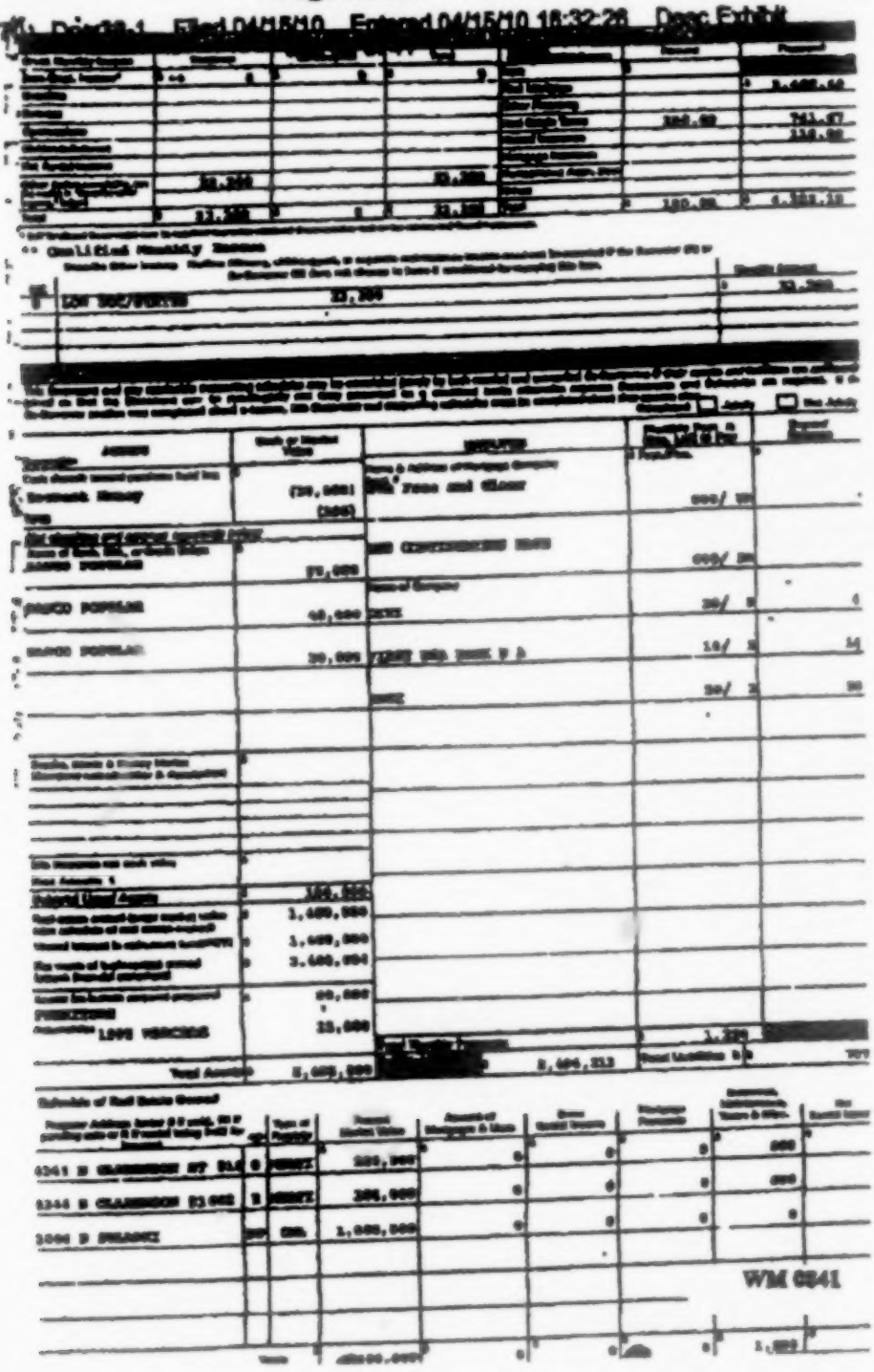

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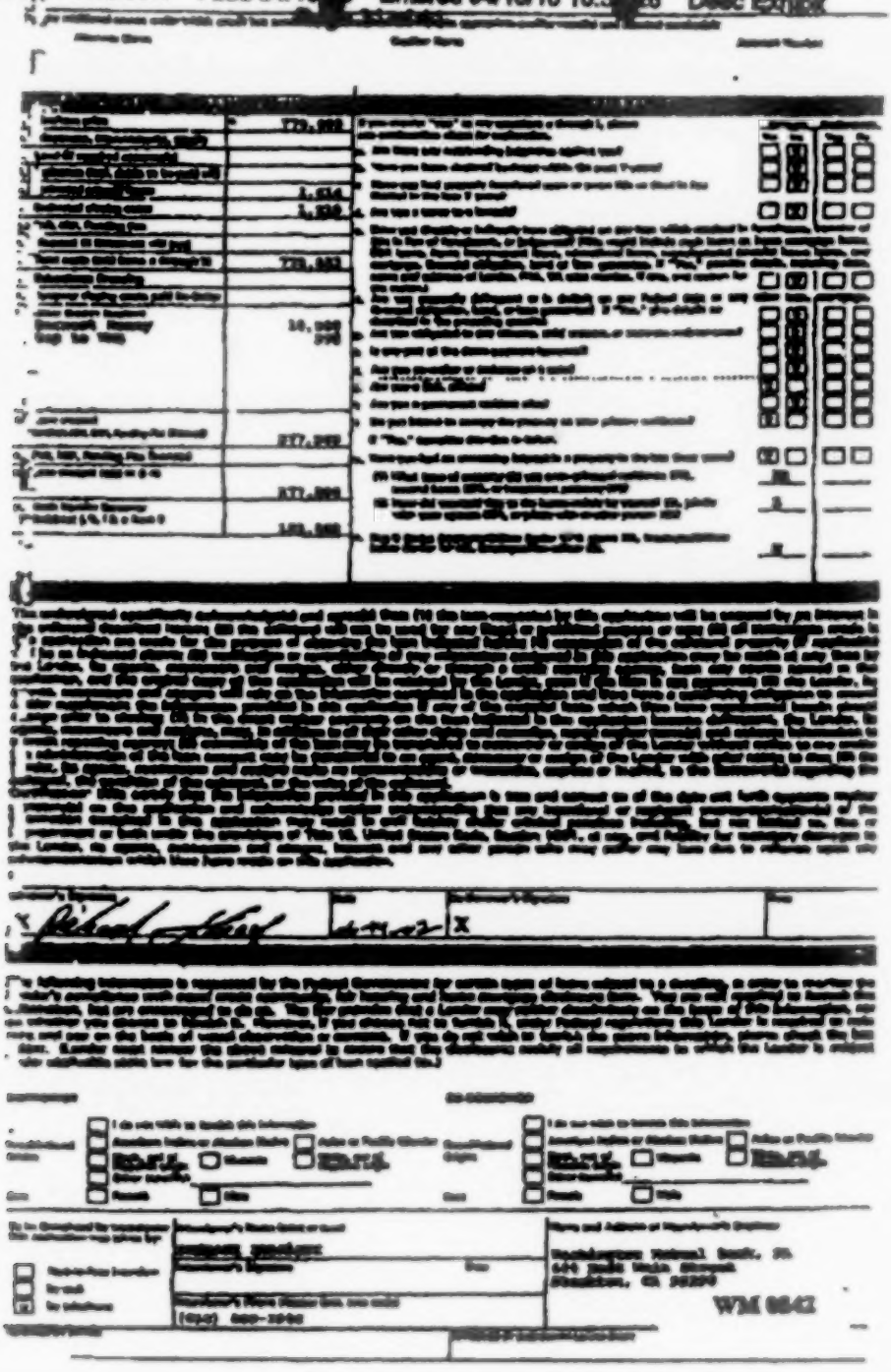


EXHIBIT D

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	No. 09-05868
	)	
RICHARD SHARIF,	)	Hon. Jacqueline P. Cox
	)	
Debtor.	)	Chapter 7
	)	
	)	
	)	
WELLNESS INTERNATIONAL NETWORK, LTD. a/k/a WIN, RALPH OATS, and CATHY OATS,	)	
	)	
	)	
Plaintiffs,	)	Adversary No. 09 A 00770
	)	
v.	)	
	)	
RICHARD SHARIF, INDIVIDUALLY AND AS TRUSTEE OF THE SOAD WATTAR LIVING TRUST,	)	
	)	
	)	
Defendant.	)	

PLAINTIFFS' FIRST REQUEST FOR PRODUCTION TO DEFENDANT AS TRUSTEE OF THE SOAD WATTAR LIVING TRUST

TO: Plaintiff Richard Sharif by and through his attorney of record, William J. Stevens, P.O. Box 22, Lakeside, Michigan 49116.

Pursuant to FED. R. CIV. P. 34 Plaintiffs Wellness International Network, Ltd. a/k/a WIN, *et al.* hereby requests Defendant Richard Sharif, as Trustee of the Soad Wattar Living Trust, to produce and permit the inspection and copying of the documents requested herein. The documents requested shall be produced within thirty (30) days after the service of this Request for Production.

Respectfully submitted,

By: /s/ Michael J. Lang
Michael J. Lang
Texas Bar No. 24036944
Gruber Hurst Johansen & Hail, LLP
1445 Ross Ave., Suite 2500
Dallas, Texas 75223
Telephone: (214) 855-6806
Facsimile: (214) 855-6808

- *and* -

Gina B. Krol
Cohen & Krol
105 W. Madison Street
Chicago, IL 60602
(312) 368-0300

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 10th day of February, 2010, in being served on all counsel of record in accordance with the Federal Rules of Civil Procedure.

/s/ Michael J. Lang
Michael J. Lang

DEFINITIONS AND INSTRUCTIONS

1. For any material or information claimed to be privileged, you must state that information or material has been withheld, the request to which the information or material relates, and the privilege or privileges asserted.

2. To the extent provided by the FEDERAL RULES OF CIVIL PROCEDURE, these discovery requests are intended to be continuing in nature. You are required to supplement your answers when appropriate or necessary.

3. Wherever the words "and" or "or" appear, the meaning intended is always "and/or."

4. The plural includes the singular and vice versa.

5. "Richard Sharif," or "you" or the "Defendant" shall mean Richard Sharif, as Trustee of the Soad Wattar Living Trust, beneficiaries, assigns, affiliates, present or former, employees, agents and representatives, as well as all other persons who at any time acted or purported to act on behalf of Defendant.

6. "Plaintiffs" shall mean Wellness International Network, Ltd., WIN Network, Inc., Ralph Oats, Cathy Oats, and Sheri Matthews.

7. "Exhibit A" shall mean the Master Loan Application date June 14, 2002, attached hereto.

8. The term "third parties" means any person or entity that is not a party to this action and is not employed or retained by a party to this action.

9. Unless otherwise specified, the relevant time period for these requests is January 1, 2002 to the present.

10. "Document" means the definition ascribed to "designated documents" under FED. R. CIV. P. 34(a). A draft or non-identical copy is a separate document within the meaning of this term.

11. "Electronic or magnetic data" refers to data or information that exists in electronic or magnetic form. Defendants request that Plaintiff produce all responsive electronic or magnetic data in the form that such data or information is originally contained or a copy in the form that such data or information is originally contained. If it is not reasonably feasible to produce such data or information in its original form or in a copy of its original form, then Defendants will accept such information on CD-ROM or DVD-ROM.

12. "Plaintiffs" shall mean all plaintiffs in this action.

DOCUMENTS REQUESTED

1. The "five hundred ninety two pages of documents generated during defendant's dealings with Washington Mutual N.A. marked as WM0002 – WM0593 during defendant's divorce litigation" that are referenced in Defendant's Initial Disclosures.

2. All correspondence between Defendant and Washington Mutual N.A. that relate to Exhibit A.

3. All "copies of checks drawn by Soad Wattar on her AG Edwards account to pay the Washington

Mutual Loan and other expenses" that are referenced in Defendant's Initial Disclosures.

4. All copies of checks drawn by Defendant on Soad Wattar's AG Edwards account.

5. All documents that relate or refer to any mortgage on the property located at 36 Rever Drive, South Barrington, Il 60010.

6. All corporate documents for Logan Square MRI & Diagnostic Center Inc., including but not limited to the Bylaws, any amendments thereto, and minutes from July 31, 1999 to the present.

7. All corporate documents for Sharif Pharmacy, Inc., including but not limited to the Bylaws, any amendments thereto, and minutes from 1992 to the present.

8. All corporate documents for Hermosa Medical Center, including but not limited to the Bylaws, any amendments thereto, and minutes from 1992 to the present.

9. All "documents relating to 36 Revere Drive, South Barrington, Illinois" that are referenced in Defendant's Initial Disclosures.

10. All "Federal and Illinois Tax returns for the Soad Wattar Living Trust," including schedules, that are referenced in Defendant's Initial Disclosures.

11. All "documents relating to the Soad Wattar Living Trust" that are referenced in Defendant's Initial Disclosures.

12. All "real estate and land trust documents relating to 4344 N. Caredon" that are referenced in Defendant's Initial Disclosures.

13. All documents evidencing the ownership interest in any real property located at 4344 N. Clarendon St. from 2002 to the present.

14. All documents evidencing the ownership interest in any real property located at 2004 N. Pulaski St. from 2002 to the present.

15. All documents evidencing the ownership interest in the "retirement fund/401k" valued at $1.4 million and identified in Exhibit A.

16. All documents evidencing the value of the "retirement fund/401k" identified in Exhibit A, from 2002 to the present.

17. All documents evidencing the ownership in the Banco Popular account valued at $90,000, identified in Exhibit A, from 2002 to the present.

18. All documents evidencing the value of the Banco Popular account valued at $90,000, identified in Exhibit A, from 2002 to the present.

19. All documents evidencing the ownership in the Banco Popular account valued at $40,000, identified in Exhibit A.

20. All documents evidencing the value of the Banco Popular account valued at $40,000, identified in Exhibit A., from 2002 to the present.

21. All documents evidencing the ownership in the Banco Popular account valued at $50,000, identified in Exhibit A.

22. All documents evidencing the value of the Banco Popular account valued at $50,000, identified in Exhibit A., from 2002 to the present.

23. All "documents relating to the Wellness claim for attorney's fees" referenced in Defendant's Initial Disclosures.

24. All Federal and State income tax returns, with schedules, filed by the Defendant from 2002 to the present.

25. All documents specifically referenced in any of the State and Federal income tax returns filed by the Defendant from 2002 to present.

26. All documents that specifically reference any and all books, records, or other memoranda of business or financial conduct, activities, status or income of the Defendant from 2002 to the present.

27. All documents specifically referencing all deeds, records, titles or other documents that relate to assets in the name of the Defendant from 2002 to the present.

28. All documents specifically referencing any records of salaries, commissions, bonuses, income from employment, allowances, expenses, or any other sums of money paid to the Defendant from 2002 to the present.

29. All documents specifically referencing the name(s) and address(es) of the person or persons who have custody of records of salaries, commissions, bonuses, allowances, expenses or

any other sums of money paid to the Defendant from 2002 to the present.

30. All documents, items, and things specifically referencing any and all accounts in which the Defendant has an interest or has had an interest from 2002 to the present.

31. All documents specifically referencing the name and address of persons or entities to whom the Defendant has given a financial statement from 2002 to the present.

32. All documents specifically referencing financial statements prepared by the Defendant from 2002 to the present.

33. All documents specifically referencing each person or entity to whom the Defendant has paid, given, or conveyed any real property or business interest from 2002 to the present.

34. All documents specifically referencing or evidencing any debt owed by the Defendant to Haifa Kaj.

35. All documents specifically referencing or evidencing any debt owed by the Defendant to Jamal Sharifeh.

36. All documents specifically referencing or evidencing any debt owed by the Defendant to Ragda Sharif.

37. All documents specifically referencing or evidencing any debt owed by the Defendant to Soad Wattar.

38. All documents specifically referencing or evidencing shares of stock owned by the Defendant or in which the Defendant claims an interest.

39. All certificates of or shares of stock owned by the Defendant, including treasury stock.

40. All documents specifically referencing or evidencing any interest the Defendant may have in any businesses, partnerships, corporations, or joint ventures.

41. All documents specifically referencing or evidencing mortgage(s) upon which the Defendant is liable.

42. All documents specifically referencing or evidencing any assets held in trust, in an estate, or in any other name or capacity in which the Defendant claims or has an interest.

43. All documents evidencing any power of attorney under which you are the designated agent.

44. All documents evidencing any account at any financial institution in which Defendant is a designated signatory.

45. All documents evidencing any beneficial, equitable, legal, or other interests in or loans or extensions of capital or credit to Logan Square MRI Center at any time from 2002 to the present.

46. All documents evidencing any beneficial, equitable, legal, or other interests in or loans or

extensions of capital or credit to Sharif Pharmacy at any time from 2002 to the present.

47. All documents evidencing any beneficial, equitable, legal, or other interests in or loans or extensions of capital or credit to Hermosa Medical Center at any time from 2002 to the present.

48. All documents evidencing any beneficial, equitable, legal, legal, limited, testamentary, or other interests of Defendant in any realty at any time in 2002 to the present.

49. All documents evidencing any beneficial, equitable, legal, or other interest of the Defendant in any automatic transfer service, checking, demand deposit, money market, negotiable order of withdrawal, passbook, savings, time deposit, or trust account at any time from 2002 to the present.

50. The Soad Wattar Living Trust, and any other testamentary instrument of any nature that bears the "Soad" or "Watter" in its name or that bequeathed, conveyed, delivered, devised, extended, funded, paid, or tendered any value to, or received any value at any time from, either Soad Wattar or the Soad Wattar Living Trust.

51. All document evidencing each use of funds from the Soad Wattar Living Trust.

52. All documents evidencing each distribution of funds from the Soad Wattar Living Trust.

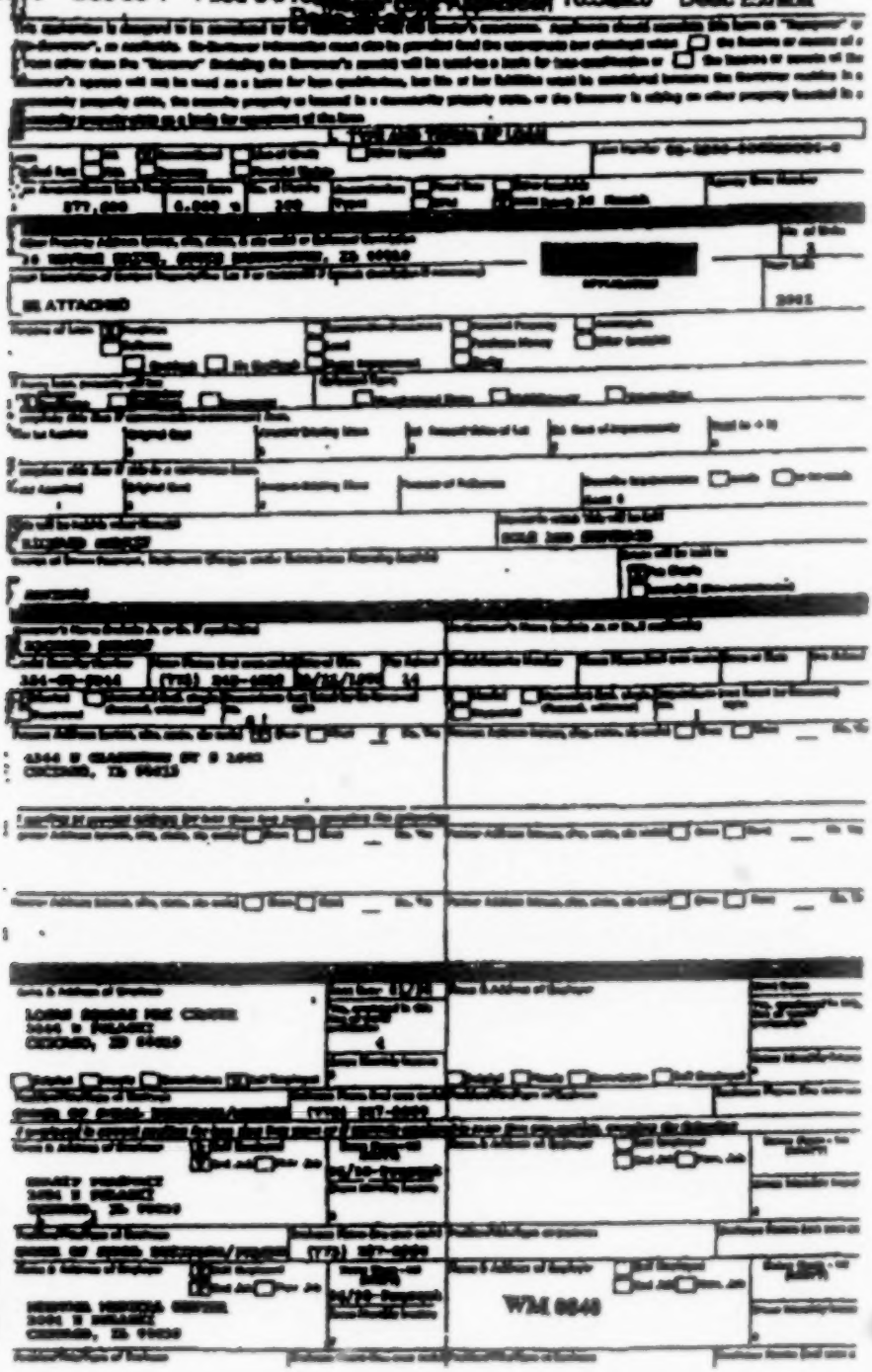
53. All documents evidencing each asset, including real property, purchased with funds from the Soad Wattar Living Trust.

54. All documents evidencing the sale of each asset that was owned by Soad Wattar Living Trust.

55. All documents evidencing the proceeds received from each investment that Defendant made with funds from the Soad Wattar Living Trust.

56. All documents evidencing the use or distribution of any proceeds received from each investment made with funds from the Soad Wattar Living Trust.

EXHIBIT



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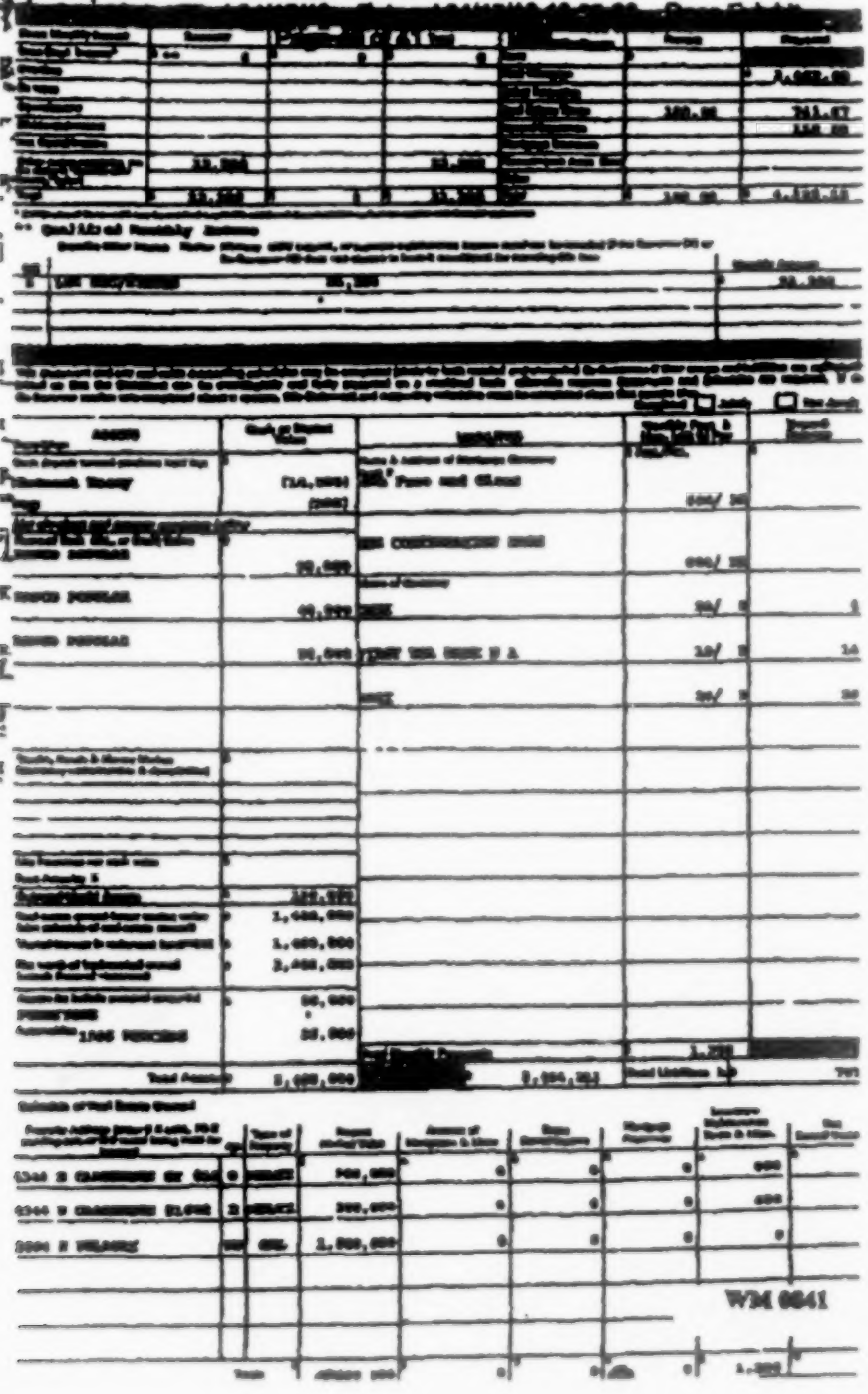
Case 09-0077



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Case 09-00770 Doc 38-1 Filed 04/1[illegible]10 Entered 04/15/10 16:[illegible]:26 Desc Exhibit
Page 41 of 47

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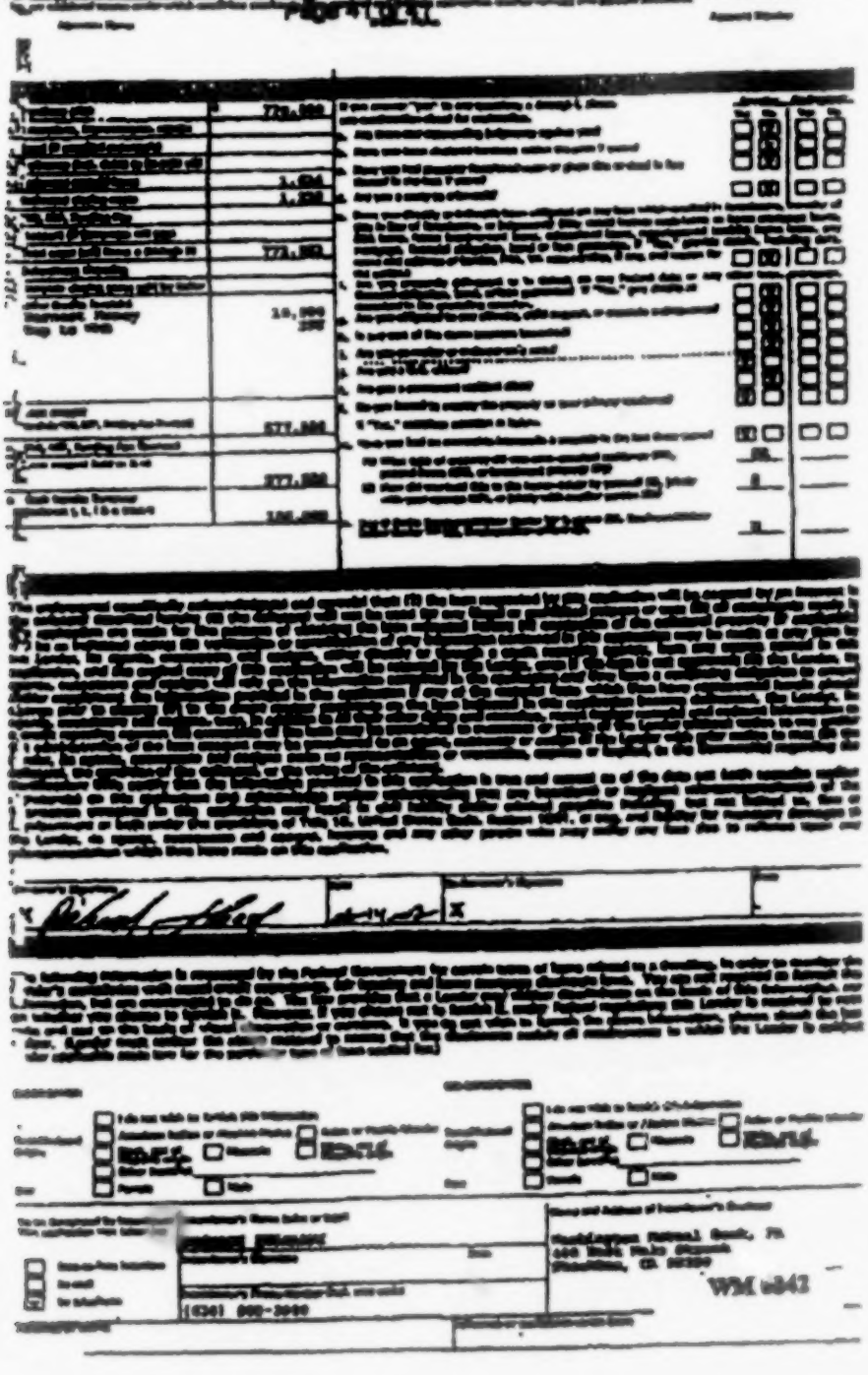

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	No. 09-05868
	)	
RICHARD SHARIF,	)	Hon. Jacqueline P. Cox
Debtor.	)	Chapter 7
	)	
	)	
	)	
WELLNESS INTERNATIONAL NETWORK, LTD. a/k/a WIN, RALPH OATS, and CATHY OATS,	)	
	)	
Plaintiffs,	)	Adversary No. 09 A 00770
v.	)	
	)	
RICHARD SHARIF, INDIVIDUALLY AND AS TRUSTEE OF THE SOAD WATAR TRUST,	)	
	)	
Defendant.	)	

NOTICE OF DEPOSITION OF RICHARD SHARIF

TO: Plaintiff Richard Sharif, individually and as Trustee of the Soad Wattar Living Trust, by and through his attorney of record, William J.

Stevens, P.O. Box 22, Lakeside, Michigan 49116.

Please take notice that Plaintiffs in the above-referenced case, pursuant Federal Rule of Civil Procedure 30 will take the oral and videotaped deposition of Richard Sharif, individually and as trustee of the Soad Wattar Living Trust, on Wednesday, March 24, 2010, beginning at 9:00 a.m.

The deposition will be taken at the offices of Foley & Lardner, LLP, 321 North Clark Street, Suite 2800, Chicago, IL 60654-5313. The deposition may be videotaped in accordance with Federal Rule of Civil Procedure 30(b)(2). The deposition will take place before a Notary Public or officer authorized by law to take depositions in the State of Illinois and under the Federal Rules of Civil Procedure, and will continue from day to day until completed, and when taken and returned according to law, may be used in evidence at trial of the above referenced cause, This deposition will be taken in accordance with the rules governing depositions in federal cases.

Respectfully submitted,

By: /s/ Michael J. Lang

BRIAN N. HAIL
Texas Bar No. 08705500
MICHAEL J. LANG
Texas Bar No. 24036944

Gruber Hurst Johansen & Hail, LLP

123
Fountain Place
1445 Ross Ave., Suite 2500
Dallas, Texas 75202
(214) 855-6800
(214) 855-6808 fax

ATTORNEYS FOR
DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 23rd day of February, 2010, in being served on all counsel of record in accordance with the Federal Rules of Civil Procedure.

/s/ Michael J. Lang
Michael J. Lang

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	No. 09-05868
	)	
RICHARD SHARIF,	)	Hon. Jacqueline P. Cox
Debtor.	)	Chapter 7
	)	
	)	
	)	
WELLNESS INTERNATIONAL NETWORK, LTD. a/k/a WIN, RALPH OATS, and CATHY OATS,	)	
	)	
Plaintiffs,	)	Adversary No. 09 A 00770
v.	)	
	)	
RICHARD SHARIF, INDIVIDUALLY AND AS TRUSTEE OF THE SOAD WATTAR LIVING TRUST,	)	
	)	
Defendant.	)	

ORDER GRANTING PLAINTIFFS' MOTION FOR SANCTIONS

On this date, the Court considered Plaintiffs' Motion For Sanctions, Costs and Fees, and, in the

alternative. Motion to Compel, Motion for Costs and Fees, and Motion to Modify Scheduling Order. After consideration of the Motion and the Court's file, the Court hereby Grants the Motion for Sanctions.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows, pursuant to Fed. R. Civ. P. 37 and Fed. R. Bankr. Proc. 7037:

(1) Defendant is prohibited from opposing Plaintiffs claims against Defendant in all capacities;

(2) Defendant's answer to Plaintiffs Amended Petition is hereby stricken;

(3) Plaintiffs shall have default judgment against Defendant Richard Sharif, individually, as follows:

(a) Defendant violated 11 U.S.C. § 27(a)(2)(A) by concealing property and refusing to provide requested documents;

(b) Defendant violated 11 U.S.C. § 727(a)(3) by concealing, destroying, mutilating, falsifying, or failing to keep or preserve documents, including documents from which Plaintiffs can ascertain Debtor's financial condition or business transactions or the formation and funding of the Soad Wattar Living Trust;

(c) Defendant violated 11 U.S.C. §727(a)(4)(A) by making false oath or account by failing to list the Loan Application Assets;

(d) Defendant violated 11 U.S.C. § 727(a)(5) by failing to explain the loss of assets that Debtor represented that he owned;

(e) The Court hereby declares that the Soad Wattar Living Trust is the alter ego of Richard Sharif and the fiction by and among Richard Sharif and the Soad Wattar Living Trust shall be disregarded, and shall be treated as a single entity;

(4) Defendant's violations of 11 U.S.C. § 727, as set forth above, necessitate the denial of the Debtor's discharge of his debts, and Debtor's petition for bankruptcy is hereby dismissed; and

(5) Plaintiffs are hereby awarded all of their reasonable expenses, including attorneys' fees, incurred to prepare for and attend Defendant's deposition, as well as the costs and fees incurred in preparing this motion and attending this hearing. Plaintiffs shall submit an affidavit proving the reasonable amount of costs and attorneys' fees incurred to prepare for and attend the Defendant's deposition, as well as the costs and fees incurred in preparing this motion and attending this hearing.

Dated this ____ day of April, 2010.

_____

UNITED STATES
BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	No. 09-05868
	)	
RICHARD SHARIF,	)	Hon. Jacqueline P. Cox
Debtor.	)	Chapter 7
	)	
	)	
	)	
WELLNESS INTERNATIONAL NETWORK, LTD. a/k/a WIN, RALPH OATS, and CATHY OATS,	)	
	)	
Plaintiffs,	)	Adversary No. 09 A 00770
v.	)	
	)	
RICHARD SHARIF, INDIVIDUALLY AND AS TRUSTEE OF THE SOAD WATTAR LIVING TRUST,	)	
	)	
Defendant.	)	

ORDER GRANTING PLAINTIFFS' MOTION FOR SANCTIONS

On this date, the Court considered Plaintiffs' Motion For Sanctions, Costs and Fees, and, in the

alternative, Motion to Compel, Motion for Costs and Fees, and Motion to Modify Scheduling Order. After consideration of the Motion and the Court's file, the Court hereby Grants the Motion for Sanctions.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows, pursuant to Fed. R. Civ. P. 37 and Fed. R. Bankr. P. 7037:

(1) Defendant's failure to timely respond, Defendant has waived any and all objections to Plaintiffs' discovery;

(2) Defendant shall physically deliver complete responses to Plaintiffs' written discovery, including documents, to the offices of Gruber Hurst Johansen & Hail, 1445 Ross Ave., Suite 2500, Dallas, Texas 75202, without objections, no later than the close of business on April 23, 2010;

(3) Defendant shall appear for deposition on May 5, 2010, or at another time if the parties mutually agree, at the offices of Foley & Lardner, LLP, 321 North Clark Street, Suite 2800, Chicago, IL 60654-5313;

(4) Plaintiffs are hereby awarded all of their reasonable expenses, including attorneys' fees, incurred to prepare for and attend Defendant's deposition, as well as the costs and fees incurred in preparing this motion and attending this hearing. Plaintiffs shall submit and affidavit proving the reasonable amount of costs and attorneys' fees incurred to prepare for and attend the Defendant's deposition, as well as the costs

and fees incurred in preparing this motion and attending this hearing; and

(5) the non-expert discovery deadline from April 1, 2010 to May 30, 2010, and extend the dispositive motion deadline from March 30, 2010 to June 15, 2010.

Defendant's failure to comply with the deadlines set out above may result in contempt, including, but not limited to, dismissal of Defendant's bankruptcy.

Dated this ____ day of April, 2010.

_____

UNITED STATES
BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	No. 09-05868
	)	Chapter 7
RICHARD SHARIF,	)	Hon. Jacqueline P.
Debtor.	)	Cox
	)	United States
	)	Bankruptcy Judge
	)	
	)	
WELLNESS INTERNATIONAL NETWORK, LTD. a/k/a WIN, RALPH OATS, and CATHY OATS,	)	
Plaintiffs,	)	
	)	Adversary No. 09
v.	)	A 00770
	)	
RICHARD SHARIF, INDIVIDUALLY AND AS TRUSTEE OF THE SOAD WATAR TRUST,	)	
Defendant.	)	

Response to Motion for Sanctions, Costs and Fees, and in the Alternative, Motion to Compel, Motion for Costs and Fees and Motion to Modify Scheduling Order [document 39]

Richard Sharif, by his attorney William J. Stevens, responds to the motion for sanctions as follows.

On February 10, 2010 plaintiffs served interrogatories and a request that defendant produce documents for inspection and copying. On February 23, 2010 plaintiff noticed defendant's deposition for March 24, 2010.

In early March, and before the discovery was due defendant's counsel advised Michael Lang that defense counsel had been unable to confer by phone with his client or meet with his client to respond to the interrogatories, produce documents or prepare for his deposition. Defense counsel believed that Richard Sharif had gone to Syria to be with his mortally ill mother and to be with his family. Plaintiff's counsel refused to bargain in good faith about discovery, refused to agree to any extension or continuance and said that he would oppose any application to the court for more time to provide the requested discovery.

Even though Michael Lang was informed that Richard Sharif was unavailable, plaintiffs had a court reporter appear on the March 24, 2010 for the defendant's deposition.

Defense counsel moved to Extend Time for Defendant's, Deposition, Extend time to Answer Interrogatories and Produce Documents and Amend Discovery Schedule [document 29]. At that time defense counsel was unable to to provide the court with evidence of Sharif 's overseas travels or his mother's terminal condition, so the motion was denied.

On April 13, 2010 Michael Lang telephoned defendant's counsel and asserted that he was seeking

sanctions because Sharif had not complied with discovery. When defense counsel offered to comply with the discovery and have defendant give his deposition after defendant returned from overseas, Mr Lang, in bad faith, rejected the offer and said that he would fie the motion for sanctions unless he received proof that Sharif actually traveled overseas.

On April 14, 2010 defense counsel sent Michael Lang the attached FAX proposing a discovery schedule, providing copies of Richard Sharif's airline tickets, providing copies of Richard Sharif's passport with visas and a copy of the death certificate for his mother (exhibit 1).

On April 15, 2010 Michael Lang, without further consultation with William J. Stevens filed his motion for sanctions. The "certificate of conference" on page 12 of the motion fails to comply with local rule 7037-1 because it fails to establish that Lang bargained in good faith. There is no need to seek the aid of the court because the defendant had just cause to postpone discovery compliance until after he returned to the United States.

We also note for the record that debtor has complied with the trustee's request for documents concerning the debtor's mother's trust, certain insurance policies and land title documents. The trustee obtained a production order which the debtor did not oppose. The debtor supplied documents to the satisfaction of counsel for the trustee.

Defendant has also complied with his rule 26 initial disclosure obligations.

Mr. Lang's purpose in seeking the discovery and making the motion for sanctions appears to be for the improper purpose of obtaining a default in the adversary proceeding or dismissal of the bankruptcy and needlessly increasing the cost of the litigation by seeking fees when the debtor is willing to comply with discovery requests. Part of Mr. Lang's improper purpose is revealed by his request that day after tomorrow copies of all the documents be produced at his office in Texas. The original request only required making the documents available for inspection and copying. Presumably compliance could be had by producing the document at local counsel's office in Chicago for her to inspect and copy the documents as she saw fit. Now Mr. Lang seeks to impose the additional burden on the debtor of making hundreds of copies before April 23, 2010 and taking those copies to Mr. Lang's office in Texas. Lang seeks to oppress not illuminate.

On sanction which may be appropriate under Rule 26(g) (3) is the striking of Michael Lang's pro hoc vice status. Perhaps a better order would be to require the parties to resolve their discover issues without resort to the court as is contemplated by local rule 7037-1.

Debtor respectfully requests that plaintiff's motion be denied. Debtor further asks that the deadline for completing discovery be extended to June 15, 2010 and that the parties be ordered to bargain in good faith to set times for interrogatory answers, document production and depositions so that no further discovery motions need be presented to the court.

Respectfully submitted,

/s/ William J. Stevens

William J. Stevens
ILARDC # 2731215
Attorney for debtor defendant
PO Box 22
Lakeside MI 49116
(269)469-1469
lawyerbill@qtm.net

Certificate of Service

William J. Stevens hereby certifies that on April 20, 2001 he filed the forgoing response with exhibit attached using the court's ECF /CM system and that in the ordinary course of business that system serves all counsel of record by e-mail.

/s/ William J. Stevens

William J. Stevens
Litigation Lawyer
Box 22
Lakeside, Michigan
49116

Office location
4235 Lake Street
Bridgman
Michigan 49106
Licensed in MI. IN & IL
State and Federal Courts

(269) 469-1469
(269) 465-6232 (FAX)
(269) 369-9685 (cell phone)
e-mail
lawyerbill@qtm.net
web site
lakesidelawyer.com

FAX Cover Sheet

April 14, 2010

Michael Lang
FAX(214)855-6808 Wellness v Sharif 09 ap 770

Attached are copies of Richard Sharif s plane tickets and passport. It appears that he left Istanbul March 5, 2010. He was not available to complete the document production by March 12, 2010 and was not in the United States on March 24, 2010 thedate originally scheduled for his deposition.

A copy of his mother's death certificate from Hôpital St Louis Aleppo Syria is also attached..

I suggest that we agree to extend the discovery cut off through May 14, 2010, require document

production and answers to interrogatories on or before May 5, 2010 and that Sharif appear for his deposition May 7, May 11 or May 14.

William J. Stevens

TURKISH AIRLINES
TÜRK HAVA YOLLARI
Filed 04/20/10 Entered 04/20/10 18:45:59 Desc Exhibit

STAR ALLIANCE

SHARIF RICHARD
ISTANBUL
ALEPPO
TK 1258 Y 05MAR23:20

I:TK0008

GROUP B
BOARDING ENDS 15 MIN. BEFORE DEPARTURE
UCAGA KABUL KALKIŞ SAATINE 15 DK KALA BITER

11A 008 2 37

BİNİŞ SAATİ VE KAPI NUMARASI İÇİN LÜTFEN MONİTÖRLERİ ZAKINZ.
PLEASE WATCH SCREENS FOR GATE NUMBER AND BOARDING TIME

SHARIF RICHARD
ISTANBUL
ALEPPO
TK 1258 Y 05MAR23:20

22:20 11A

2 37 008 MM/

SYRIAN

SHARIF/RICHARDMR
ALEPPO
ISTANBUL
TURK HAVA YOLLARI
TK C949 Y 07APR 3230
01:30 12A NO

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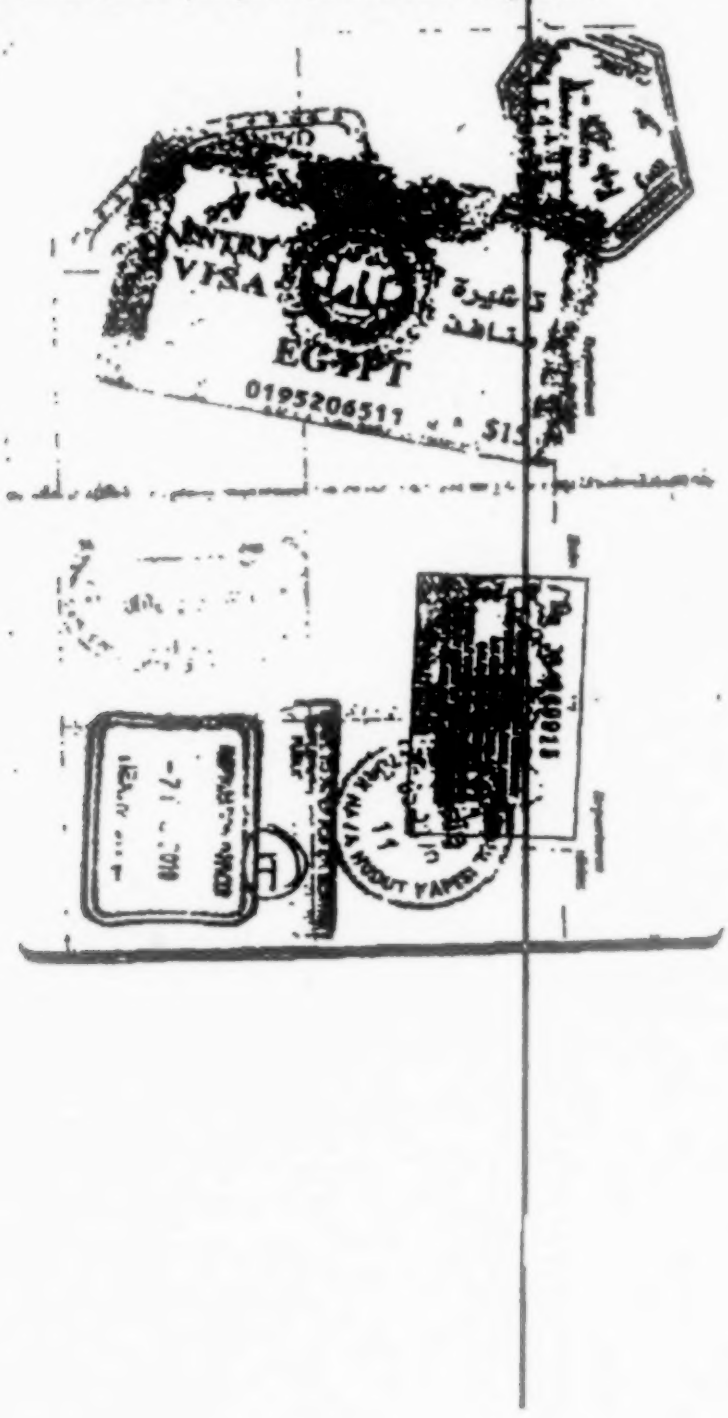
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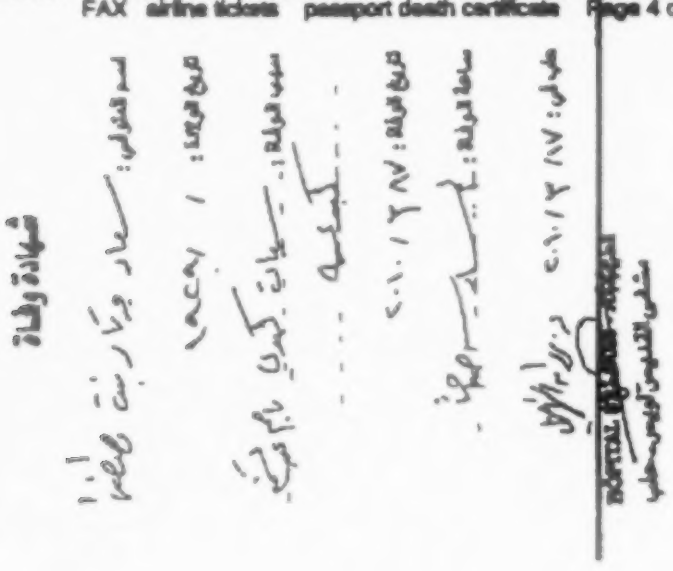

شهادة وفاة

اسم المتوفى: سعاد جرجس بطرس

تاريخ الوفاة: ٢٠١٠/٢/٨

سبب الوفاة: سرطان الكبد

ساعة الوفاة: ٢٠١٠/٢/٨

طبيب: ٢٠١٠/٢/٨

مستشفى الشفاء التخصصي الجامعي - حلب

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable
JUDGE JACQUELINE P. COX
Bankruptcy
Richard Sharif 09-05868

Hearing Date
4-21, 2010
Adversary
09 A 00770

Title of Case
Wellness International Network et al v. Richard Sharif
Brief Statement of Motion
Motion of Wellness International Network et al for Sanctions against Richard Sharif
Names and Addresses of moving counsel
Sara B. Krot
105 W. Madison St. Ste 1100
Chicago IL 60602
Representing
Wellness International Network et al

ORDER

IT IS HEREBY ORDERED,

That Richard Sharif, Individually and as Trustee has to April 28, 2010 to Comply with all of Plaintiffs' Outstanding discovery requests including document production, interrogatories and 2004 examination, and It is Further Ordered that in the event Richard Sharif fails to comply by April 28, 2010, an order of default will be entered against him in the proceeding, and The Motion is continued for proof of compliance to April 28, 2010 at 10:00 a.m.

UNITED STATES BANKRUPTCY JUDGE J. Cox
Jacqueline P. Cox

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	No. 09-05868
	)	
RICHARD SHARIF,	)	Hon. Jacqueline P. Cox
	)	
Debtor.	)	Chapter 7
	)	
	)	
	)	
WELLNESS INTERNATIONAL NETWORK, LTD. a/k/a WIN, RALPH OATS, and CATHY OATS,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adversary No. 09 A 00770
	)	
RICHARD SHARIF, INDIVIDUALLY AND AS TRUSTEE OF THE SOAD WATAR TRUST,	)	
	)	
Defendant.	)	

Supplemental Response to Plaintiffs' Motion for Sanctions [doc 35]

Defendant has substantially complied with all outstanding discovery. Attached to this supplemental response are defendant's answers to interrogatories, responses to document production requests, excerpts from defendant's deposition where he appeared for and gave his deposition over a seven hour period and a schedule of and additional 3,000 documents produced a plaintiffs' counsel's office following the deposition.

Plaintiffs initially sought sanctions because defendant was outside the United States attending his mother's last illness and memorial and not available to co-operate in the production of documents, answering of interrogatories or giving of his deposition at the originally scheduled times.

Defendant answered the interrogatories and responded to the document production requests prior to the last hearing on the plaintiff's motion for sanctions. Plaintiffs persisted in their motion. After the interrogatories were answered and approximately 1,000 documents were produced, plaintiffs did not write or call defense counsel about the adequacy of the response to the document production. At defendant's deposition plaintiffs' counsel insinuated by his questions that document disclosures were incomplete. Although defendant maintains that his initial responses to document production requests and answers to interrogatories were adequate, defendant produced an additional 3,000 documents: bank statements and investment records.

Plaintiffs have persisted in claiming that defendant's disclosures are inadequate. It is now plain that plaintiffs seek defaults or sanctions rather than the truth about defendant's financial condition. The rules in this district require counsel to seek to resolve discovery disputes before coming to court. Plaintiffs' counsel came straight to court. As soon as defendant returned to the United States and was available to co-operate in the discovery process, discovery was provided expeditiously.

The motion for sanctions should be denied.

Respectfully submitted,

/s/ William J. Stevens

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Certificate of Service

William J. Stevens hereby certifies that on May 23, 2010 he filed the forgoing supplemental response using the court's ECF/CM system and that in the ordinary course of business that system served all counsel entitled to notice by e-mail.

/s/ William J. Stevens

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Richard Sharif, Appellant, v. Wellness International Network, Ltd., Ralph Oats and Cathy Oats, Appellees.	1:10cv 5303. Hon. Harry D. Leinenweber Bankruptcy Court # 09 B 5868

MOTION TO SET SUPPLEMENTAL BRIEFING SCHEDULE

On December 30, 2011 the United States Court of Appeals for the Seventh Circuit rendered its decision in the case *In re Rene Ortiz* ___ F3d ___, 2011 WL 6880651 (7th Cir 12/30/2011, case numbers 10-3465, 10-3466) which raises substantial questions about the finality of the bankruptcy court's orders under appeal in this case.

In the present appeal the debtor challenges the propriety of the bankruptcy court's holding that the Soad Wattar Trust was a sham as a discovery sanction in an adversary case related to the debtor's bankruptcy. The Seventh Circuit's recent holding suggests that the bankruptcy court's order should only be treated as a report and recommendation and should not be treated as a final order.

Debtor asks the court to set a supplemental briefing schedule to brief the finality of the order under appeal and to explore, treating the orders under appeal as reports and recommendations with an opportunity to object or have this court withdraw the reference of the bankruptcy case to this court to decide the discovery issues and the validity of the Soad Wattar Trust.

Respectfully submitted,

*/s/*William J. Stevens

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CERTIFICATE OF SERVICE

On January 12, 2012 William J. Stevens filed the foregoing motion using the court's ECF/CM System. In the ordinary course of business that court serves all counsel of record by e-mail.

/s/William J. Stevens

PETITIONER'S BRIEF

No. 13-935

IN THE

Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LIMITED, RALPH OATS, AND CATHY OATS,

Petitioners,

v.

RICHARD SHARIF,

Respondent.

On Writ of Certiorari to the United States Court Of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

1. Whether the presence of a subsidiary state property law issue in an 11 U.S.C. §541 action brought against a debtor to determine whether property in the debtor's possession is property of the bankruptcy estate means that such action does not "stem[] from the bankruptcy itself" and therefore, that a bankruptcy court does not have the constitutional authority to enter a final order deciding that action.

2. Whether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant's conduct is sufficient to satisfy Article III.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

The Petitioners are Wellness International Network, Limited, Ralph Oats, and Cathy Oats. Petitioners were the plaintiffs-appellees below. Wellness International Network, Limited, is a subsidiary of WIN Network, Inc. No publicly-held entity owns ten percent or more of the stock of Wellness International Network, Limited.

The respondent is Richard Sharif, the debtor-defendant and appellant below.

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OPINIONS BELOW

The Seventh Circuit's opinion, Pet.App.1a-66a, is reported at 727 F.3d 751. Both the district court's opinion, Pet.App.69a-91a, and the bankruptcy court's opinion, Pet.App.92a-120a, are unpublished.

JURISDICTION

The Seventh Circuit entered judgment on August 21, 2013 and denied a timely petition for rehearing *en banc* on October 7, 2013. Pet.App.67a-68a. On December 20, 2013, Justice Kagan extended the time within which to file a petition for a writ of *certiorari* to February 5, 2014. The petition was filed on that date and granted on July 1, 2014. Jurisdiction rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, §1 of the Constitution provides:

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

U.S. CONST. art III, §1.

STATUTORY PROVISIONS INVOLVED

The primary statutory provisions involved in this case are 28 U.S.C. §157 and §1334 and 11 U.S.C. §541, which are reprinted in the attached addendum.

STATEMENT OF THE CASE

Sections 1334 and 157 of the United States Judicial Code establish the framework under which bankruptcy courts preside over more than one million cases and adversary proceedings each year.[1] Section 1334 supplies district courts with subject-matter jurisdiction over all bankruptcy cases and the adversary proceedings that "arise[] in" or are "related to" those bankruptcy cases or that "arise under" the Bankruptcy Code. 28 U.S.C. §1334(a),(b). Section 157(a) authorizes district courts to refer, in whole or in part, bankruptcy cases and adversary proceedings to the bankruptcy courts, which are "unit[s] of the district court." 28 U.S.C. §§151, 157(a).

Section 157 "divide[s] all matters that may be referred to the bankruptcy court into two categories: 'core' and 'non-core' proceedings." *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165, 2171 (2014). It also contains a non-exhaustive list of "core" proceedings identifying the types of matters that Congress understood to be "integral to the core bankruptcy function" and involving "all necessary

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[1] *See* http://uscourts.gov/Statistics/BankruptcyStatistics.aspx (Filings for 2008 through 2013).

aspects of a bankruptcy case." 28 U.S.C. §157(b)(2); 130 CONG. REC. E1108-09 (daily ed. March 20, 1984). For those matters deemed "integral to the core bankruptcy function," *id.* at 1109, "the statute empowers the bankruptcy judge to enter final judgment on the claim, subject to appellate review by the district court. If a matter is non-core, and the parties have not consented to final adjudication by the bankruptcy court, the bankruptcy judge must propose findings of fact and conclusions of law. Then, the district court must review the proceedings *de novo* and enter final judgment." *Executive Benefits*, 134 S. Ct. at 2172.

District courts have complete discretion to decide whether to refer a particular case or adversary proceeding to a bankruptcy court and may withdraw a reference previously made at any time for cause. 28 U.S.C. §157(a),(d). Cause is not defined in the statute and thus, district courts have wide discretion to withdraw matters previously referred.

In *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011), the Court held that "in one isolated respect" Congress exceeded the limitations of Article III of the Constitution by designating a bankruptcy estate's state-law counterclaim against a creditor who had filed a proof of claim as a core matter. In a situation where a non-debtor had not consented to be sued in bankruptcy court, *Stern* held that Article III precluded the bankruptcy court from entering judgment on a state-law counterclaim that did not "stem from the bankruptcy itself" or would not

"necessarily be resolved in the claims allowance process." 131 S. Ct. at 2618. *Stern* concluded that, because the debtor's tortious interference counterclaim was "in no way derived from or dependent upon bankruptcy law" and would "exist[] without regard to any bankruptcy proceeding," the bankruptcy court could not constitutionally enter a final order in that action. *Id.*

Stern did not catalogue every matter that "stems from the bankruptcy itself." *Id.* But the test the Court articulated, coupled with the Court's statement that its decision did "not change all that much," *id.* at 2620, strongly suggested that bankruptcy courts would continue to have the constitutional authority to hear and determine those matters that historically have been the "[c]ritical features of every bankruptcy"—"the exercise of exclusive jurisdiction over all of the debtor's property." *Central Va. Cmty. College v. Katz*, 546 U.S. 356, 363-64 (2006).

In this case, the Seventh Circuit ignored *Stern's* test for determining which matters are within a bankruptcy court's constitutional authority to decide and, as a result, expanded *Stern* far beyond its "narrow" holding. 131 S. Ct. at 2620. It held that bankruptcy courts lack the constitutional authority to decide whether property in the debtor's possession is property of the bankruptcy estate under 11 U.S.C. §541 when that determination also requires resolution of state-law issues. Pet.App.45a-51a.

Under a correct application of *Stern*, the §541 action at issue here was both statutorily and constitutionally within the bankruptcy court's authority to decide. An action to determine whether property in a debtor's possession belongs to that debtor's bankruptcy estate cannot "exist[] without regard to any bankruptcy proceeding." 131 S. Ct. at 2618. This conclusion flows ineluctably from the fact that a bankruptcy estate has no existence outside of the bankruptcy case because it is the "commencement of a case ... [that] creates an estate." 11 U.S.C. §541(a). Thus, an action to determine what is included within the bankruptcy estate is the quintessential action that "stems from the bankruptcy itself." 131 S. Ct. at 2618. Indeed, if an action against the debtor to decide whether property he holds belongs to his bankruptcy estate is *not* an action that "stems from the bankruptcy itself" it is hard to imagine what actions would ever satisfy this test.

The Seventh Circuit thus misread *Stern* when it concluded that the claim before it was a "*Stern* claim," *i.e.*, "a claim designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter." *Executive Benefits*, 134 S. Ct. at 2170. The Seventh Circuit further erred by holding that "*Stern* claims" cannot be treated like non-core claims and tried in bankruptcy court with litigant consent under 28 U.S.C. §157(c)(2). Pet.App.31a-45a. In reaching this result, the Seventh Circuit broke with the Court's long line of

precedent holding that the right to insist on an Article III judge is "primarily [a] personal" right which may be waived. *See, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986). It also employed reasoning that would invalidate major components of the bankruptcy and magistrate court systems.

A. Respondent's Bankruptcy Filing.

The dispute between Respondent Richard Sharif ("Sharif") and Petitioner Wellness International Network, Limited ("Wellness") began more than a decade ago, in 2003. Pet.App.4a. Sharif sued Wellness in the United States District Court for the Northern District of Texas. The district court entered judgment for Wellness after Sharif ignored Wellness's discovery requests. Pet.App.5a. The Fifth Circuit affirmed, calling Sharif's suit against Wellness "feckless" and remanding with directions to consider an award of attorney's fees. Pet.App.5a-6a (citing *Sharif v. Wellness Int'l Network, Ltd.*, 273 F. App'x 316, 317 (5th Cir.), *cert. denied*, 555 U.S. 1085 (2008)). On remand, the district court awarded Wellness $655,596.13 in attorney's fees. Pet.App.6a.

Thereafter, Wellness commenced a collection action in the Northern District of Texas. *Id.* Sharif ignored Wellness's post-judgment collection discovery. *Id.* As a result, the district court held Sharif in contempt and had him arrested. *Id.* Sharif obtained his release from jail by promising to answer Wellness's discovery, but instead of doing so, Sharif

filed a chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Northern District of Illinois. *Id.* Wellness was the only creditor to file a claim in Sharif's chapter 7 case. Pet.App.6a-7a.

In bankruptcy, Sharif again failed to answer questions about his assets, including questions about property worth $5,380,000 that Sharif listed on a pre-bankruptcy loan application but omitted from his bankruptcy schedules. Pet.App.7a. When the chapter 7 trustee questioned Sharif about the missing assets at the creditors' meeting held pursuant to 11 U.S.C. §341, Sharif testified that he lied on his loan application, that the missing assets actually belonged to the Soad Wattar Trust, and that he held the assets merely as trustee. *Id.* Wellness and the chapter 7 trustee asked for the trust documents; Sharif failed to produce them. Pet.App.7a-8a.

B. The Adversary Proceeding.

Wellness filed an adversary proceeding against Sharif in the bankruptcy court pursuant to 11 U.S.C. §727 objecting to Sharif's discharge. J.A.5-22. Wellness alleged that Sharif should not receive a discharge because, among other things, Sharif lied when he claimed the Soad Wattar Trust owned the disputed property. J.A.13-16,18-19. Wellness also sought a declaratory judgment that the assets Sharif purportedly held in trust—the same assets that Sharif listed on his personal financial statement—

actually were property of Sharif's bankruptcy estate. J.A.19-21; Pet.App.8a.

Wellness alleged that its complaint was a core proceeding, J.A.6, meaning that §157(b)(1) authorized the bankruptcy court to enter judgment. 28 U.S.C. §157(b)(1). Sharif admitted that the claims were core. J.A.24. Had Sharif denied that the claims were core, Bankruptcy Rule 7012 would have required him to state whether he consented to the bankruptcy court entering a judgment. Fed. R. Bankr. P. 7012(b).

Yet again, Sharif failed to respond properly to Wellness's discovery requests and to the bankruptcy court's related orders. Pet.App.8a-9a. As a result, Wellness moved for sanctions yet again, asking the bankruptcy court, among other things, to enter a default judgment against Sharif. Pet.App.9a. The bankruptcy court allowed Sharif time to comply with the discovery, warning Sharif in a written order that if he did not comply, the court would enter a default judgment against him. J.A.140-141. Sharif ignored that warning and the bankruptcy court conducted a hearing on the sanctions motion. Pet.App.10a. After that hearing, but before the bankruptcy court had ruled, Sharif moved for summary judgment, denying the merits of Wellness's allegations and asking the bankruptcy court to enter judgment in his favor on all counts of Wellness's complaint. *Id.*

On July 6, 2010, the bankruptcy court found that Sharif had failed to comply with its discovery order

in 16 different respects, including by failing to produce documents evidencing the formation or funding of the alleged Soad Wattar Trust. Pet.App.10a-14a,99a-120a. As a result, the bankruptcy court denied Sharif's summary judgment motion and entered a default judgment against Sharif, denying Sharif his discharge and declaring that the assets purportedly held by Sharif in the alleged trust were property of Sharif's bankruptcy estate. *Id.*

C. Appellate Proceedings In The District Court And The Court Of Appeals.

Sharif appealed to the United States District Court for the Northern District of Illinois. Pet.App.14a. Although Sharif filed his opening appeal brief six weeks *after* the Court had decided *Stern*, he did not challenge the bankruptcy court's constitutional authority to enter judgment. Pet.App.15a. Instead, after briefing closed, Sharif moved for leave to file a supplemental brief (again without citing *Stern*), arguing that the Seventh Circuit's decision, *Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906 (7th Cir. 2011), "suggests that the bankruptcy court's order should only be treated as a report and recommendation and should not be treated as a final order." J.A.145. The district court denied Sharif's motion as untimely and affirmed. Pet.App.16a,90a-91a.

Sharif then appealed to the Seventh Circuit. Pet.App.17a. Once again, Sharif failed to contest the

bankruptcy court's constitutional authority to enter a judgment and did not cite *Stern*. No.12-1349, Dkt.13 (7th Cir.). As a result, Wellness had no reason to address *Stern* in its response brief. *Id.*, Dkt.22. Sharif first cited *Stern* in his reply, arguing that the bankruptcy court lacked jurisdiction to declare which assets were property of Sharif's bankruptcy estate. *Id.*, Dkt.29. Sharif did not, however, contest the bankruptcy court's constitutional authority to decide the discharge claim. *Id.*; Pet.App.17a.

On August 21, 2013, the Seventh Circuit affirmed the judgment denying Sharif a discharge. It held that Wellness's objections to Sharif's discharge "stem from federal law, not state law, as the provisions of 11 U.S.C. §727 provide the relevant rules of decision" and the decision "to grant or deny discharge is central to the restructuring of the debtor-creditor relationship." Pet.App.1a,45a-46a.

The Seventh Circuit reached the opposite result on the §541 property-of-the-estate claim, holding that the bankruptcy court lacked the constitutional authority to decide whether property in the debtor's possession was property of the debtor's bankruptcy estate. Pet.App.46a-51a. The Seventh Circuit reached this result even though it also acknowledged that the Court "has not come close to holding that an Article III judge must decide claims for which the Bankruptcy Code itself provides the rule of decision...." Pet.App.46a. Focusing on the fact that §541 property-of-the-estate determinations also involve questions of state law, the Seventh Circuit

concluded that Wellness's request for a declaration that the supposed trust assets were estate property is a "state-law claim between private parties that is wholly independent of federal bankruptcy law and is not resolved in the claims-allowance process" and therefore "is indistinguishable from the tortious-interference counterclaim in *Stern*." Pet.App.48a,51a.

Although it concluded that Sharif had waived his *Stern*-based arguments by failing to make them in a timely manner, the Seventh Circuit nonetheless considered them. Pet.App.31a-45a.[2] Because it read *Stern* as holding that §157(b) violated the structural protections of Article III, §1 of the Constitution, the Seventh Circuit concluded that Sharif could not waive his constitutional objections. Pet.App.45a. The Seventh Circuit insisted its holding applied only to "*Stern* claims" and so if a matter was non-core under §157(c), litigants could still consent to the bankruptcy court entering a judgment under §157(c)(2). Pet.App.42a-43a. The Seventh Circuit also ruled that §157 contained a statutory gap that prevented the district court from considering the bankruptcy court's order as a report and recommendation, Pet.App.51a-54a, a conclusion the

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[2] The Seventh Circuit characterized Sharif's failure to make his *Stern*-based arguments in a timely manner as a waiver, not a forfeiture. Pet.App.31a. As set forth in Section II.C., *infra*, Sharif did not simply forfeit his *Stern* arguments; he gave his consent both by filing his bankruptcy petition and by moving for summary judgment.

Court subsequently rejected in *Executive Benefits*, 134 S. Ct. at 2173.

Wellness filed a petition for rehearing *en banc*, which was denied. Pet.App.67a-68a. It then filed a timely petition for *certiorari*, which the Court granted on July 1, 2014.

SUMMARY OF ARGUMENT

The Seventh Circuit held that post-*Stern*, bankruptcy courts may no longer decide actions against a debtor to determine whether property in the debtor's possession belongs to the debtor's bankruptcy estate even with litigant consent. Pet.App.31a-51a. It further held that because Wellness's claim was a so-called "*Stern* claim," the bankruptcy court lacked statutory authority to take any action with respect to that claim, including even presiding over discovery or recommending proposed findings of fact and conclusions of law to the district court. Pet.App.51a-54a. The Court already has corrected the last of these errors in *Executive Benefits* by holding that "*Stern* claims" are the same as non-core claims, thereby closing §157's supposed "statutory gap." 134 S. Ct. at 2172-74. Wellness now asks the Court to correct the first two errors.

Contrary to the Seventh Circuit's conclusion, Wellness's §541 action is not a "*Stern* claim." In *Stern*, the Court emphasized that it was not invalidating the authority of bankruptcy courts to enter judgments in all circumstances, which would

effect a massive disruption of the bankruptcy system. To the contrary, the Court held that bankruptcy courts could continue to enter judgments in actions that "stem[] from the bankruptcy itself." 131 S. Ct. at 2618. As the Court explained, because the state-law tort action against the creditor in *Stern* was "in no way derived from or dependent upon bankruptcy law" and would "exist[] without regard to any bankruptcy proceeding," it was outside of the constitutional bounds of the bankruptcy court's authority to enter judgment. *Id.*

The same is not true here. Wellness's §541 action against Sharif to determine if property in Sharif's possession belongs to his bankruptcy estate is a claim that "stems from the bankruptcy itself." *Stern*, 131 S. Ct. at 2618. Bankruptcy jurisdiction "is principally *in rem* jurisdiction." *Central Va. Cmty. College*, 546 U.S. at 369. Thus, a bankruptcy court's "exercise of exclusive jurisdiction over all of the debtor's property" is a "[c]ritical feature[] of every bankruptcy." *Id.* at 363-64. By automatically creating an estate when Sharif filed for bankruptcy, §541 constructs the means by which the basic bargain of every bankruptcy is satisfied: the debtor surrenders his property in exchange for a fresh start. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). Thus, a dispute *with a debtor* about which of his assets belong to his bankruptcy estate necessarily "stems from the bankruptcy." *Stern*, 131 S. Ct. at 2618.

Moreover, Wellness's action seeking a declaration that Sharif's bankruptcy estate, and not Sharif individually, holds title to the alleged trust assets in Sharif's possession is nothing like the state-law counterclaim seeking money damages against a third party that was at issue in *Stern*. By definition, Wellness's §541 action could arise only post-bankruptcy because it is the "commencement of a case ... [that] creates an estate." 11 U.S.C. §541(a). Unlike a state-law tort claim, a §541 action also "'depend[s] upon the will of congress,'" because Congress establishes the terms under which a debtor's property is included in the bankruptcy estate. 131 S. Ct. at 2614 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855)); *see also* U.S. CONST. art I, §8, cl. 4.

Furthermore, contrary to the Seventh Circuit's analysis, the underlying presence of state-law issues does not alter this conclusion. A §541 action is "derived from" and "dependent upon bankruptcy law," *Stern*, 131 S. Ct. at 2618, even if it requires the resolution of subsidiary state-law issues. *See, e.g.*, *Parks v. Dittmar (In re Dittmar)*, 618 F.3d 1199, 1204 (10th Cir. 2010). Indeed, in other contexts, the Court has recognized that the presence of state-law issues does not transform an action based on a Bankruptcy Code provision into a state-law claim. In *Law v. Siegel*, for example, the Court recognized that federal law—11 U.S.C. §522—creates the right to claim an exemption even if the specifics of that exemption are based upon state law. 134 S. Ct. 1188, 1196-97 (2014); *accord Barnhill v. Johnson*,

503 U.S. 393, 397-98 (1992) (what constitutes a "transfer" under 11 U.S.C. §101(54) is a federal law question even though state law informs the answer). Here, the debtor claimed to own the property at issue only as a trustee, thereby implicating questions of state trust law. But whether trust property is part of the estate is a question that §541(d) expressly makes a matter of federal bankruptcy law. *See* 5 Collier on Bankruptcy, ¶541.28, at 541-103-04 (Alan A. Resnick *et al.* eds., 16th ed. 2013) (explaining that §541(d) applies whenever a debtor claims he holds property in trust).

A "firmly established historical practice" also authorizes bankruptcy courts to decide whether a debtor's property belongs to his bankruptcy estate. *See Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring). From the framing of the Constitution, and before under English law, bankruptcy courts (and their historical precursors) have always decided such issues. Thomas E. Plank, *Why Bankruptcy Judges Need Not And Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 584-87, 600-10 (1998). The Court just this year recognized in *Executive Benefits* that bankruptcy judges historically had the authority to decide claims involving "'property in the actual or constructive possession of the [bankruptcy] court.'" 134 S. Ct. at 2170 (citing Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall*, 86 Am. Bankr. L.J. 121, 124 (2012)) (original modification).

The Seventh Circuit's conclusion that property-of-the-estate determinations are not constitutionally core due to the presence of subsidiary state-law issues marks a significant departure from this historical precedent that would shift much of the traditional work of bankruptcy courts to the district courts as state-law issues permeate many, if not most, aspects of bankruptcy cases. *Stern*, 131 S. Ct. at 2616. Because *Stern* does not hold, or even suggest, that the Constitution requires such a radical reassignment of the judicial workload, the Court should reverse the Seventh Circuit's ruling that §541 actions are "*Stern* claims."

Because the action here is within the bankruptcy court's constitutional authority to decide, the Court need not reach the second question on which it granted *certiorari*. If the Court elects to decide the second question, it should conclude that bankruptcy courts may, consistent with Article III, decide "*Stern* claims" with a litigant's express or implied consent.

As a general matter, Article III "serves to protect primarily personal, rather than structural, interests" and "as a personal right ... is subject to waiver." *Schor*, 478 U.S. at 848. The Seventh Circuit misread *Stern* to hold that structural interests predominate when bankruptcy courts decide "*Stern* claims," making litigant consent irrelevant. Pet.App.31a-45a. *Stern*, however, addressed the Article III question in the absence of consent. The Court described *Stern* as "establish[ing] only that Congress may not vest in a non-Article III court the power to adjudicate, render

final judgment, and issue binding orders in a traditional contract [or tort] action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review." 131 S. Ct. at 2615 (emphasis added, internal quotations omitted).

Allowing the bankruptcy court to enter judgment on Wellness's §541 claim against Sharif with Sharif's consent does not raise Article III structural concerns. As the Court explained in *Schor*, unwaivable structural interests arise only when Congress "attempts to transfer jurisdiction [to non-Article III tribunals] for the purposes of emasculating constitutional courts...." 478 U.S. at 850 (internal citations and quotations omitted) (original modification). Congress has not done that in §157. Bankruptcy courts operate wholly within the Judicial Branch, exercising jurisdiction over "*Stern* claims" only upon referral from the district courts and entering judgment only with litigant consent.

Indeed, the Court has consistently upheld the judgments of non-Article III adjudicators when the referring court has had subject matter jurisdiction over the suit and possessed the necessary reference authority (either by tradition, statute, or rule) and the parties have consented. *See, e.g., Roell v. Withrow*, 538 U.S. 580, 586-87 (2003); *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263, 268 (1932); *Heckers v. Fowler*, 69 U.S. 123, 131 (1864). In the directly analogous context of magistrate judges, the Court in *Roell* emphasized the singular

significance of consent to the Article III analysis, holding that a magistrate judge may enter judgment in a civil suit with the express or implied consent of the parties. 538 U.S. at 589-91. Thus, because resort to a bankruptcy judge under §157 always requires the authorization of an Article III judge and the election of the parties, allowing bankruptcy courts to decide "*Stern* claims" with litigant consent does not violate Article III.

Finally, in this case, Sharif consented to have determinations about his property decided by the bankruptcy court. He voluntarily filed for bankruptcy, moving his dispute with Wellness that was already before an Article III judge in Texas to a bankruptcy court in Illinois. He did so on notice that §541 would make all of his non-exempt property part of his bankruptcy estate. Once in bankruptcy, Sharif asked the bankruptcy court to enter summary judgment in his favor. Pet.App.10a. *A fortiori* by asking the bankruptcy court to enter judgment, Sharif necessarily consented to the bankruptcy court's authority to do so. Only long after he lost (and long after the Court decided *Stern*), did Sharif raise Article III concerns. J.A.145-146. Finding consent from Sharif's conduct "checks the risk of gamesmanship" and "substantially honor[s]" Sharif's Article III right. *Roell*, 538 U.S. at 590.

ARGUMENT

I. Bankruptcy Courts Have Constitutional Authority To Enter Judgment On §541 Claims Because The Determination Whether A Debtor's Property Is Property Of The Bankruptcy Estate "Stems From The Bankruptcy Itself."

The "narrow" holding of *Stern* is that, absent party consent, bankruptcy courts "lack[] the constitutional authority to enter a final judgment on a [debtor's] state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." 131 S. Ct. at 2620. As the Seventh Circuit acknowledged, "the Supreme Court [did] not come close to holding [in *Stern*] that an Article III judge must decide claims for which the Bankruptcy Code itself provides the rule of decision...." Pet.App.46a. Instead, *Stern* framed the operative constitutional question as "whether the action at issue stems from the bankruptcy itself *or* would necessarily be resolved in the claims allowance process." 131 S. Ct. at 2618 (emphasis added). Because the "action at issue" in *Stern*, a debtor's state-law-based counterclaim against a creditor, was "in no way derived from or dependent upon bankruptcy law" and would "exist[] without regard to any bankruptcy proceeding," the Court held that it did not "stem[] from the bankruptcy itself" and the bankruptcy court lacked the constitutional authority to decide it. *Id.*

The Seventh Circuit misapplied *Stern*. It held that the bankruptcy court lacked the constitutional

authority to decide whether the debtor Sharif's property belonged to his bankruptcy estate or should be treated as trust property in which Sharif held only a legal interest as trustee and not equitable title. Although the action at issue "derived from" and was "dependent upon bankruptcy law," specifically Bankruptcy Code §541(a) and (d), and could only "exist[]" because Sharif had filed his bankruptcy case, the Seventh Circuit nonetheless concluded it was outside the bankruptcy court's authority to decide because state law played a role in the decision. Pet.App.45a-51a. If allowed to stand, the Seventh Circuit's expansive reading of *Stern's* "narrow" holding, 131 S. Ct. at 2620, would cripple the bankruptcy courts' authority, both because property-of-the-estate determinations are among the most basic of questions a bankruptcy court must adjudicate and because state-law issues permeate all aspects of bankruptcy cases.

A. Consistent With *Stern*, Bankruptcy Courts May Enter Judgments Deciding Whether A Debtor's Property Is Part Of His Bankruptcy Estate Under Bankruptcy Code §541.

1. Section 541 Determinations "Stem[] From The Bankruptcy Itself."

No determination more clearly "stems from the bankruptcy itself" than the §541 assessment of whether property in the debtor's possession is property of the bankruptcy estate. 131 S. Ct. at

2618. Section 541's creation of the bankruptcy estate, and the bankruptcy court's authority over the property within that estate, form the central mechanism by which the goals of bankruptcy are achieved.

As the Court explained in *Central Virginia Community College*, "[b]ankruptcy jurisdiction, as understood today and at the time of the framing, is principally *in rem* jurisdiction." 546 U.S. at 369. "In bankruptcy, 'the court's jurisdiction is premised on the debtor and his estate, and not on the creditors.'" *Id.* at 370 (quoting *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004)). Congress recognized the *in rem* nature of federal bankruptcy jurisdiction by providing in 28 U.S.C. §1334(e) that district courts (and bankruptcy courts if a matter is referred under §157(a)) have "exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate...." Thus, a bankruptcy court's "exercise of exclusive jurisdiction over all of the debtor's property" is a "[c]ritical feature[] of every bankruptcy." *Central Va. Cmty. College*, 546 U.S. at 364-65.

The *in rem* nature of bankruptcy jurisdiction serves "[o]ne of the primary purposes of [bankruptcy]" which is to "give[] to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure

and discouragement of pre-existing debt." *Local Loan*, 292 U.S. at 244. To achieve this purpose, the Code provides that "[a]s a general matter, upon the filing of a petition for bankruptcy, 'all legal or equitable interests of the debtor in property' become the property of the bankruptcy estate and will be distributed to the debtor's creditors." *Rousey v. Jacoway*, 544 U.S. 320, 325 (2005) (quoting 11 U.S.C. §541(a)(1)). By creating the estate at the outset of the bankruptcy case, bankruptcy law "secure[s] for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition." *Segal v. Rochelle*, 382 U.S. 375, 379 (1966). It further gives bankruptcy courts "exclusive jurisdiction" over the estate to ensure an "equitable distribution of that property among the debtor's creditors...." *Central Va. Cmty. College*, 546 U.S. at 363-64.

Plainly, the determination whether property in the debtor's possession is property of the bankruptcy estate is integral to the bankruptcy process. That determination forms the very basis of the bankruptcy court's *in rem* jurisdiction. It also is the necessary predicate to distributing the estate assets to creditors, the central purpose of bankruptcy. Bankruptcy courts' authority over bankruptcy estates would be utterly ineffectual were bankruptcy courts without the power to determine which of the debtor's assets actually fall within the estate. Creditors also would no longer be able to rely on bankruptcy courts to collect and distribute all of a debtor's property equitably and expeditiously. This

would thwart a "chief purpose of the bankruptcy laws" which is "'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period.'" *Katchen v. Landy*, 382 U.S. 323, 328 (1966) (quoting *Ex parte Christy*, 44 U.S. 292, 312 (1845)).

The Court recognized this foundational point over a hundred years ago in *Mueller v. Nugent*, 184 U.S. 1 (1902), a case brought under the 1898 Bankruptcy Act. In *Mueller*, the debtor transferred certain property to an agent, pre-bankruptcy, to hold in trust. When the bankruptcy trustee claimed that property on behalf of the bankruptcy estate, the agent protested, contending that the bankruptcy court lacked authority to adjudicate the claim. The Court thus faced the question whether "the bankruptcy court [has] the power to compel the bankrupt or his agent to deliver up money or other assets of the bankrupt [or whether] a mere refusal by the bankrupt or his agent so to deliver up oblige[s] the trustee to resort to a plenary suit in the circuit court or a state court...." *Id.* at 14.

In holding that the bankruptcy court had the authority to adjudicate the matter and issue a final order, *Mueller* observed "the filing of the [bankruptcy] petition is a *caveat* to all the world," that upon the filing of the petition the entirety of the debtor's property—whether in "actual or constructive possession"—is "placed in the custody of the bankruptcy court." *Id.* If the bankruptcy court nonetheless were unable to determine whether

property held by the debtor in his constructive possession was properly within the bankruptcy estate, the authority of the bankruptcy court would be "seriously impaired, and in many respects rendered practically inefficient." *Id.* As the Court explained, "[t]he bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law." *Id.*

The rule of *Mueller*—that a bankruptcy court has the authority to determine whether property in the debtor's possession is property of the estate regardless of party consent—is a bedrock principle of bankruptcy law and follows naturally from the fundamental tenet that "a federal court always has jurisdiction to determine its own jurisdiction," here the scope of the bankruptcy court's *in rem* jurisdiction. *United States v. Ruiz*, 536 U.S. 622, 628 (2002).

The Court made this exact point explicitly in *Taubel-Scott-Kitzmiller Co. v. Fox*, concluding that "[a]s every court must have power to determine, in the first instance, whether it has jurisdiction to proceed, the bankruptcy court has, in every case, jurisdiction to determine whether it has possession actual or constructive [of a debtor's property]." 264 U.S. 426, 433 (1924). Although the Court concluded

in *Fox* that the bankruptcy court lacked the authority to enter a judgment, it reached that conclusion only because the property at issue was not in the debtor's actual or constructive possession. *Id.* at 438. Thus, *Fox* clearly states the principle the Court applied in *Mueller*—inherent within a bankruptcy court's authority to administer the bankruptcy estate is the authority to decide whether property in the debtor's actual or constructive possession constitutes part of that estate. Accordingly, an action to determine if property held by the debtor belongs to the bankruptcy estate is an action that "stems from the bankruptcy itself." *Stern*, 131 S. Ct. at 2618.

2. *Stern* Did Not Alter Bankruptcy Courts' Authority To Make §541 Determinations.

Stern did not overrule *Mueller* or otherwise suggest that bankruptcy courts may no longer decide whether a debtor's property is included in his bankruptcy estate under §541. The Seventh Circuit erroneously concluded otherwise because it failed to appreciate the significant substantive differences between Wellness's §541 action and the tortious interference claim at issue in *Stern*. Pet.App.48a. The Seventh Circuit found the two actions "indistinguishable," because it misunderstood a §541 action to be a state-law claim that, like the tortious interference claim in *Stern*, was intended to augment the estate by recovering property from entities other than the debtor. *Id.*

But the §541 action at issue here is nothing like the tortious interference counterclaim in *Stern*. The tort claim at issue in *Stern* was not based on the Bankruptcy Code at all. There the debtor sued a creditor for money damages on a common law tort claim for an injury that occurred *before* the bankruptcy case was even filed. *Stern*, 131 S. Ct. at 2601-02. The tort action was not central to the bankruptcy case; indeed, the only reason the action in *Stern* was not before a state court was because one of the parties to the dispute had filed for bankruptcy.

This is the polar opposite of a §541 action, which can arise only *after* a debtor files for bankruptcy and is central to a "restructuring of debtor-creditor relations" and thus at the "core of the federal bankruptcy power...." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982). Indeed, without a bankruptcy estate, there would be nothing to restructure. Moreover, a §541 action also does not seek monetary damages; it seeks a declaration of title consistent with a bankruptcy court's traditional *in rem* jurisdiction.

Further, a §541 action possesses none of the three attributes that caused the Court to conclude that the tortious interference claim in *Stern* did not "stem[] from the bankruptcy itself [n]or would [it] necessarily be resolved in the claims allowance process." 131 S. Ct. at 2618. *First*, the *Stern* debtor's tortious interference claim was a "state law action independent of the federal bankruptcy law

and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy." *Id.* at 2611. *Second*, the *Stern* debtor's "claimed right to relief [did] not flow from a federal statutory scheme," *id.* at 2614, and was instead a "state common law [claim] between two private parties," that did "'not 'depend[] on the will of congress,'" *id.* (quoting *Murray's Lessee*, 59 U.S. at 284). *Third*, the *Stern* debtor's tort action was brought "'to augment the bankruptcy estate'" rather than to adjust "'creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res.'" *Stern*, 131 S. Ct. at 2614 (quoting *Granfinanciera, S.A v. Nordberg*, 492 U.S. 33, 56 (1989)).

Wellness's §541 action differs on all three counts. *First*, an action to determine whether property in the debtor's possession belongs to his bankruptcy estate is *wholly* dependent upon federal bankruptcy law and is an issue that, pursuant to the text of the Bankruptcy Code itself, arises in every single bankruptcy case. *See* 11 U.S.C. §541(a). The Seventh Circuit's confusion over this point likely stems from a misunderstanding about the role state law plays in §541 property-of-the-estate determinations. As the Court recognized in *Butner v. United States*, 440 U.S. 48, 55 (1979), state law establishes most property rights. Thus, bankruptcy courts generally look first to state law to determine what a debtor's rights are in a particular piece of property. "Once that state law determination is made, however, [bankruptcy courts] must still look to federal bankruptcy law to resolve the extent to which

that interest is property of the estate under §541." *Dittmar*, 618 F.3d at 1204 (internal quotations omitted).[3]

In this case, that means that even though state law informs the decision about whether Sharif's trust was a sham, whether the purported trust assets ultimately would be considered property of the bankruptcy estate is a federal law question answered by Bankruptcy Code §541(a) and (d). Thus, because federal law ultimately determines whether a particular asset is in or out of the bankruptcy estate, a §541 action (unlike the common law tort at issue in *Stern*) cannot be described as a "state law action independent of the federal bankruptcy law...." *Stern*, 131 S. Ct. at 2611.[4]

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[3] *Accord Croft v. AMS SA Mgmt., L.L.C. (In re Croft)*, 737 F.3d 372, 374 (5th Cir. 2013) (*per curiam*) (explaining that federal law establishes extent to which debtor's property rights become bankruptcy estate property); *Tyler v. DH Capital Mgmt., Inc.*, 736 F.3d 455, 461 (6th Cir. 2013) (same); *Abboud v. The Ground Round, Inc. (In re The Ground Round, Inc.)*, 482 F.3d 15, 17 (1st Cir. 2007) (same); *American Bankers Ins. Co. of Florida v. Maness*, 101 F.3d 358, 363 (4th Cir. 1996) (same); *N.S. Garrott & Sons v. Union Planters Nat'l Bank of Memphis (In re N.S. Garrott & Sons)*, 772 F.2d 462, 466 (8th Cir. 1985) (same); *see also Law*, 134 S. Ct. at 1196-97 (recognizing right to a homestead exemption under §522 is a federal question, even if the type and value of the property to be exempted is determined by state law); *Barnhill*, 503 U.S. at 397-98 (recognizing same in context of §101(54)).

[4] In other contexts, the Court has recognized this same interplay between state property law and federal law. For

That the Court could not have intended in *Stern* that subsidiary state-law issues would transform matters arising under specific Bankruptcy Code provisions into "state law actions" outside of the bankruptcy court's decisional authority is further underscored by *Stern's* recognition that bankruptcy courts may, consistent with Article III, decide creditor claims against the bankruptcy estate. 131 S. Ct. at 2618. Like property interests, "[c]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation," which generally is state law. *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000); *accord Butner*, 440 U.S. at 55. As with property-of-the-estate determinations, the question whether a state law-based claim is allowed against the estate under 11 U.S.C. §502 is a matter of federal law. *See, e.g., Stancill v. Hartford Sands Inc. (In re Harford Sands Inc.)*, 372 F.3d 637, 640 (4th Cir. 2004). Thus, the Court's recognition that bankruptcy courts may, consistent with Article III, decide disputes involving the allowability of creditor claims demonstrates that post-*Stern*, bankruptcy courts may continue to decide state-law issues.

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example, in *United States ex rel. Tennessee Valley Authority v. Powelson*, the Court held that "[t]hough the meaning of 'property' as used in §25 of the [Tennessee Valley Authority Act of 1933] and in the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law." 319 U.S. 266, 279 (1943). In *Yiatchos v. Yiatchos*, 376 U.S. 306, 309 (1964), the Court recognized this same interplay in a case involving the survivorship provisions of federal bonds.

Second, also unlike *Stern's* common law tort claim, Wellness's "claimed right to relief" under §541 "flow[s] from a federal statutory scheme." 131 S. Ct. at 2614. The Constitution authorizes Congress "[t]o establish ... uniform Laws on the subject of Bankruptcies...." U.S. CONST. art I, §8, cl. 4. Section 541 is central to the uniform bankruptcy law that Congress has established because, as explained above, the creation of the bankruptcy estate pursuant to §541 is the means by which Congress "secure[s] for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition." *Segal*, 382 U.S. at 379. Thus, property-of-the-estate determinations "flow from a federal statutory scheme." *Stern*, 131 S. Ct. at 2614.

Third, the Seventh Circuit's characterization of a §541 claim as one "intended only to augment the bankruptcy estate"—with citations to *Stern*, *Granfinanciera*, and *Northern Pipeline*—misapprehends the Court's use of the word "augment" in those decisions. Pet.App.48a. As the Court explained in *Granfinanciera*, an action "augment[s]" the estate when it "'constitute[s] no part of the proceedings in bankruptcy but concern[s] controversies arising out of it....'" 492 U.S. at 56 (quoting *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94-95 (1932)). *Schoenthal*, like *Granfinanciera*, *Northern Pipeline*, and *Stern*, involved a trustee's action against a third-party to obtain a money judgment that would "augment" the estate by bringing in new funds from that third-party. In

contrast, a §541 action establishes the proper extent of the estate by determining whether a debtor is withholding property in his actual or constructive possession that rightfully belongs in his bankruptcy estate rather than "augmenting" the estate with additional funds from a third-party.

Thus, unlike the third-party actions in those cases, the action at issue here is part of the bankruptcy proceedings. *Granfinanciera*, 492 U.S. at 56 (internal quotations omitted). "[T]he restructuring of debtor-creditor relations," which is described as being at the "core of the federal bankruptcy power," *Northern Pipeline*, 458 U.S. at 71, starts with the *in rem* creation of a bankruptcy estate and that estate, at a minimum, consists of all property in a debtor's actual or constructive possession. *Rousey*, 544 U.S. at 325; *Mueller*, 184 U.S. at 13-14. A claim against a debtor seeking to ensure that all of his property is properly placed within the estate therefore necessarily is "part of the proceedings in bankruptcy...." *Granfinanciera*, 492 U.S. at 56. Thus, Wellness's §541 claim against debtor Sharif was not an action seeking to "augment" the estate; it sought to ensure that the estate was properly constituted in the first instance.

* * *

Because *Stern* expressly holds that bankruptcy courts may decide actions that, like the §541 action here, "stem[] from the bankruptcy itself," 131 S. Ct.

at 2618, the Court should reverse the Seventh Circuit's decision.

B. Firmly-Established Historical Practice Authorizes Bankruptcy Courts To Decide Those Actions That "Stem[] From The Bankruptcy Itself," Such As Whether A Debtor's Property Constitutes Property Of The Bankruptcy Estate.

A "firmly established historical practice" also authorizes bankruptcy courts to decide whether a debtor's property constitutes property of the bankruptcy estate. *Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring). The Framers of the Constitution would have understood non-Article III bankruptcy judges (or, using earlier nomenclature, commissioners or referees) to possess the authority to decide actions "stem[ming] from the bankruptcy itself." Plank, 72 Am. Bankr. L.J. at 572-75; Brubaker, 86 Am. Bankr. L.J. at 123.

At the time of the Founding, the Framers' understanding of bankruptcy derived from English bankruptcy acts. These acts were not part of the common law and they authorized commissioners to adjudicate the basic issues arising in bankruptcy, such as a debtor's eligibility for bankruptcy relief, what constitutes property of the estate, the allowance of claims against that estate, the distribution of the estate to creditors, and the debtor's entitlement to a discharge. Plank, 72 Am. Bankr. L.J. at 575-77. From the earliest days of

bankruptcy practice in this country, Congress has modeled our bankruptcy laws upon the English system in place at the time of the Founding and thus, placed the authority to decide these basic bankruptcy matters with non-Article III adjudicators. This "firmly established historical practice" authorizes bankruptcy courts to decide whether a debtor's property constitutes property of the bankruptcy estate. *Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring).

1. English Laws At The Time Of The Founding Authorized Bankruptcy Commissioners To Determine The Extent Of A Debtor's Property.

Under the English bankruptcy act in effect at the time of the Founding, the Lord Chancellor appointed five bankruptcy commissioners to preside over bankruptcy proceedings, and these five commissioners, or a quorum of three, determined almost all of the issues arising in the bankruptcy proceedings. Plank, 72 Am. Bankr. L.J. at 576-78 (citing 5 Geo. 2, ch. 30, §§1,2 (1732)). Central to the bankruptcy commissioners' authority was the power to seize property in the debtor's actual or constructive possession. Thus, bankruptcy commissioners could issue a warrant for the seizure of a debtor's "Goods, Wares, Merchandizes and Effects ... and Books, Papers or Writings." 5 Geo. 2, ch. 30, §14 (1732) (Eng.). Under the Statute of 1 James, these commissioners also could break open the homes, warehouses, trunks, or chests of the

bankrupt to seize property belonging to the bankruptcy estate. 1 Jam. ch. 15, §8 (1604) (Eng.); *see generally* Plank, 72 Am. Bankr. L. J. at 585-87.

As Sir William Blackstone observed, "all personal estate and effects of the bankrupt are considered as vested by the act of bankruptcy ... and the commissioners by their warrant may cause any house or tenement of the bankrupt to be broken open, in order to enter upon and seize the same." 2 WILLIAM BLACKSTONE, COMMENTARIES *485. Thus, under the English model, bankruptcy commissioners had "*in rem* jurisdiction over property rightfully in the possession of the estate," and could administer that property—including through its distribution to creditors—in summary equitable proceedings. *See* Brubaker, 86 Am. Bankr. L. J. at 124.

2. Early American Bankruptcy Statutes Continued The Practice Of Vesting Commissioners With Authority Over Property In The Actual Or Constructive Possession Of The Debtor.

In our nation's earliest bankruptcy statutes, Congress adopted the English practice of conferring upon bankruptcy commissioners who were not Article III judges the authority to decide almost all matters. *See* Brubaker, 86 Am. Bank. L.J. at 124-25. The first federal bankruptcy statute, the Bankruptcy Act of 1800, authorized bankruptcy commissioners "to take into their possession, all the estate, real and

personal, of every nature and description to which the said bankrupt may be entitled, either in law or equity, in any manner whatsoever, and cause the same to be inventoried and appraised to the best value." Bankruptcy Act of 1800, ch. 19 §5, 2 Stat. 19 (repealed 1803). The 1800 Act gave bankruptcy commissioners power over a debtor's estate so complete that a commissioner could "imprison recalcitrant third parties in possession of the estate's assets." *Central Va. Cmty. College*, 546 U.S. at 370. Similarly, the Bankruptcy Acts of 1841 and 1867 gave federal courts jurisdiction over "all matters and proceedings in bankruptcy" and authorized federal courts to appoint bankruptcy commissioners to exercise that jurisdiction. *See* Bankruptcy Act of 1841, ch. 9 §6, 5 Stat. 440 (repealed 1843); Bankruptcy Act of 1867, ch. 176 §6, 14 Stat. 517 (repealed 1878).

3. The Bankruptcy Act Of 1898 Continued The Practice Of Vesting Bankruptcy Referees With Authority Over Property In The Debtor's Actual Or Constructive Possession.

The Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (Code, tit. 11 U.S.C. §66) (repealed 1978), was the first comprehensive permanent federal bankruptcy legislation and it remained in force (with various amendments and modifications) until the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). The 1898 Act designated district courts as "courts of bankruptcy" and, with

some exceptions, invested those courts with the power to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto." Bankruptcy Act of 1898, §2(a)(7) (Code, tit. 11, ch. 2, §11).

Like the earlier bankruptcy acts, the 1898 Act authorized the district courts to appoint bankruptcy referees and authorized these referees to exercise "summary *in rem* jurisdiction ... to adjudicate all disputes incident to administration of property in the actual or constructive possession of the court." Brubaker, 86 Am. Bank. L.J. at 128; Bankruptcy Act of 1898, §§34, 38 (Code, tit. 11, ch. 5, §§62, 66); *see also* 2A Collier on Bankruptcy, ¶38.09[2], at 1428-29 (James Wm. Moore *et al.* eds., 14th ed. 1978). As the Court explained in *Van Huffel v. Harkelrode*, "bankruptcy court[s] possess[] the power ... to collect, reduce to money and distribute the estates of bankrupts, and to determine controversies with relation thereto." 284 U.S. 225, 227-28 (1931).

Since 1898, Article III courts—including this Court—have frequently affirmed the authority of bankruptcy referees to exercise summary jurisdiction over property in the actual or constructive possession of the debtor. In *Mueller*, as discussed above, the Court rejected the notion that a bankruptcy referee lacked authority to enter final orders about property in the debtor's actual or constructive possession, reasoning that the referee's "grant of jurisdiction to cause the estates of bankrupts to be collected ...

would be seriously impaired" if a referee lacked such authority. 184 U.S. at 14.

Following *Mueller*, the courts of appeals consistently acknowledged the authority of bankruptcy referees operating under the 1898 Act to issue judgment orders concerning property in a debtor's actual or constructive possession. *See, e.g.*, *White v. Murtha*, 343 F.2d 831, 832 (5th Cir. 1965). Significantly for purposes of this case, the courts of appeals also confirmed the authority of bankruptcy referees to enter final orders deciding that property held by entities that debtors had created to shield their assets from turnover belonged to the bankruptcy estate. For example, in *Wellston, Okla., Natural Gas Authority Bondholders v. Nesbitt (In re Eufaula Enterprises, Inc.)*, the Tenth Circuit held that the bankruptcy referee could disregard distinct legal entities in determining ownership of assets because the entities were alter egos of each other. 565 F.2d 1157, 1161 (10th Cir. 1977).

4. Before The Decision Below, The Courts Of Appeals Had Continued To Affirm The Authority Of Bankruptcy Courts Constituted Under The 1984 Act To Determine Whether Property Of The Debtor Is Property Of The Estate.

In 1978, Congress passed the Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978). "[T]he 1978 Act mandated that bankruptcy judges

'shall exercise' jurisdiction over 'all civil proceedings arising under title 11 or arising in or related to cases under title 11.'" *Executive Benefits*, 134 S. Ct. at 2170 (quoting 28 U.S.C. §1471(b)-(c) (repealed)). "Under the 1978 Act, bankruptcy judges were 'vested with all of the 'powers of a court of equity, law, and admiralty,' with only a few limited exceptions." 134 S. Ct. at 2171 (quoting *Northern Pipeline*, 458 U.S. at 55 and 28 U.S.C. §1481 (repealed)). In 1982, the Court struck this statute as unconstitutional in *Northern Pipeline*, holding that "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584 (1985).

In response to *Northern Pipeline*, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), Pub. L. No. 98-535, 98 Stat. 333 returning to district courts the complete discretion to determine whether and when to refer matters to the bankruptcy courts. 28 U.S.C. §§151, 157(a). BAFJA also limited the ability of bankruptcy courts to enter judgment orders, in the absence of party consent, to those matters deemed "core" to the bankruptcy case. *Id.* at §157(b)(1); *Executive Benefits*, 134 U.S. at 2171-72.

Following *Northern Pipeline* and the enactment of BAFJA, the courts of appeals consistently upheld

the authority of bankruptcy courts to decide disputes about property in the debtor's possession. In *Canal Corp. v. Finnman (In re Johnson)*, the Fourth Circuit addressed the authority of the bankruptcy court to enter a final order deciding whether property in the debtor's possession belonged to the bankruptcy estate in light of the Court's decision in *Northern Pipeline*. 960 F.2d 396, 400-02 (4th Cir. 1992). The Fourth Circuit concluded that the bankruptcy court had the constitutional authority to decide whether the property was estate property or should instead be distributed to a limited group of creditors because the determination of whether the property belonged to the bankruptcy estate was inextricably tied to the question of who was entitled to the funds. Both matters therefore were "intimately tied to the traditional bankruptcy functions and estate, and, therefore, are core matters within the clear jurisdiction of the bankruptcy court." *Id.* at 402.

The Fourth Circuit's conclusion that the bankruptcy court had the authority to enter a final order hinged on the fact that, just as in the instant case, the debtor was in possession of the property in dispute. *Id.* at 400-02. As the Eleventh Circuit explained in a subsequent case, *The Whiting-Turner Contracting Co. v. Electric Machinery Enterprises, Inc. (In re Electric Machinery Enterprises, Inc.)*, the debtor's possession of the disputed asset is what gave the bankruptcy judge the constitutional authority to enter judgment in *Johnson*. 479 F.3d 791, 797 (11th Cir. 2007).

* * *

History thus confirms that bankruptcy adjudicators, whether acting pursuant to authority granted by acts of the English Parliament in the early 17th century, or acts of Congress from 1800 to the modern day, have long exercised, as part and parcel of the authority granted to them, the power to determine whether property in the debtor's actual or constructive possession constitutes property of the bankruptcy estate. The Seventh Circuit's ruling to the contrary stands in stark contrast to hundreds of years of historical practice and is neither required nor even suggested, by *Stern*.

C. The Seventh Circuit's Reading Of *Stern* Threatens The Efficient Administration Of Bankruptcy Cases.

If allowed to stand, the Seventh Circuit's implicit prohibition against bankruptcy courts deciding state-law issues would severely limit what bankruptcy courts may do and would transfer most of their work to the district courts. State law by necessity pervades many bankruptcy law determinations because "[p]roperty interests are created and defined by state law." *Stern*, 131 S. Ct. at 2616 (internal quotations omitted); *Butner*, 440 U.S. at 55.

Indeed, Congress intended that bankruptcy courts would decide incidental state-law issues. When the bill that became §157 was introduced, its sponsor, Representative Robert Kastenmeier,

anticipated that bankruptcy courts would continue to decide state-law issues "that arise in the course of restructuring debtor-creditor rights," stating that these issues are "matters of Federal law." 130 CONG. REC. E1109 (daily ed. March 20, 1984).

Stern did not hold (or even suggest) otherwise. Post-*Stern*, the operative constitutional question is whether an action "stems from the bankruptcy itself" not whether the bankruptcy court must decide an incidental issue of state law. 131 S. Ct. 2618. When addressing the question *Stern* posed, the Court can and should consider the practical implications of its ruling. "The idea of separation of powers is justified by eminently practical considerations. It is faithful to the idea of separation of powers to examine the real consequences of the statute." *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.* 725 F.2d 537, 546-47 (9th Cir. 1984) (*en banc*) (citing The Federalist No. 51 (J. Madison) at 349 (J. Cooke ed. 1961)) (other citation omitted).

The "real consequences" here of eliminating bankruptcy courts' authority to decide state-law issues would be to divest bankruptcy courts of most of their decisional authority. Given the very large number of bankruptcy cases filed each year, the practical consequences would be enormous for the efficient administration of the federal courts. This radical reassignment also would be contrary to the Court's assurance in *Stern* that its decision would *not* "meaningfully change[] the division of labor [between bankruptcy and district courts under

§157]...." 131 S. Ct. at 2620; *see also Executive Benefits*, 134 S. Ct. at 2173 n.8. Accordingly, the Court should conclude that §541 actions are within the bankruptcy courts' constitutional authority to decide.

II. Even If A §541 Claim Is A "*Stern* Claim," Litigants May Consent To Adjudicate Those Claims To Judgment Before The Bankruptcy Courts Without Offending Article III.

Because the action at issue here is *not* a so-called "*Stern* claim," the Court need not reach the second question on which it granted *certiorari*. If the Court does address this question, however, it should reaffirm its precedents permitting the consensual resolution of private rights before non-Article III adjudicators.

A. The Seventh Circuit Erred By Concluding That *Stern* Bars Bankruptcy Courts From Deciding "*Stern* Claims" With Litigant Consent.

Article III, §1 of the Constitution protects two distinct interests: the rights of litigants "to have claims decided before judges who are free from potential domination by other branches of government," and "the role of the independent judiciary within the constitutional scheme of tripartite government." *Schor*, 478 U.S. at 848 (internal citations and quotations omitted). As a general matter, Article III's "guarantee of an

independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States ... serves to protect *primarily personal*, rather than structural, interests." *Id.* (emphasis added). Because Article III, §1's purpose is "primarily" to protect the individual, the Court has held that the right to an Article III judge "is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Id.* at 848-49.

Thus, when the litigants have consented, the Court has consistently upheld the authority of adjudicators who are not Article III judges—within and sometimes even outside the Judicial Branch—to hear any and all proceedings in bankruptcy cases or in other civil cases, and to enter judgment. *See, e.g.*, *Gonzalez v. United States*, 553 U.S. 242, 252 (2008); *Roell*, 538 U.S. at 586-87; *Schor*, 478 U.S. at 848; *MacDonald*, 286 U.S. at 268. As the Court explained in *Peretz v. United States*, "*with the parties' consent*, a district judge may delegate to a magistrate supervision of entire civil and misdemeanor trials." 501 U.S. 923, 933 (1991) (emphasis added). Undoubtedly because Article III "primarily" protects personal rights, *Schor*, 478 U.S. at 848, the Court has found constitutional violations arising from non-Article III adjudications only when the litigants did not consent. *See, e.g.*, *Stern*, 131 S. Ct. at 2614-15; *Northern Pipeline*, 458 U.S. at 56-57.

In this case, the Seventh Circuit undervalued the critical importance of consent to the Article III

analysis. The Seventh Circuit read *Stern* as "unequivocally" holding that there was a structural separation of powers problem with bankruptcy courts entering judgments on "*Stern* claims" that would persist even with litigant consent. Pet.App.41a. But in reaching this conclusion, the Seventh Circuit failed to appreciate that *Stern* was not a case, like this one, where the litigant had consented to the bankruptcy court's authority to adjudicate the dispute. In *Stern*, the creditor objected to the bankruptcy court entering a judgment on the debtor's state-law counterclaim both before and after the bankruptcy court ruled against him. 131 S. Ct. at 2601-02. The debtor nonetheless argued that the creditor had consented to the bankruptcy court's authority to enter a judgment because the creditor had filed a proof of claim in the debtor's bankruptcy case. *Id.* at 2615-16. The Court rejected this argument, reasoning that unlike the litigant in *Schor* who had filed suit in a non-Article III forum and thus consented to proceed there, a creditor in a bankruptcy case has "nowhere else to go" to collect on its claim and thus, by filing that claim, does "not truly consent" to be sued on a counterclaim in bankruptcy court. *Id.* at 2614-15.

Stern therefore addressed the constitutional problems that arise in the *absence* of litigant consent. The Court itself acknowledged this fact, noting that *Stern* and *Northern Pipeline* both could be described as "'establish[ing] only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding

orders in a traditional contract [or tort] action arising under state law, *without consent of the litigants,* and subject only to ordinary appellate review.'" 131 S. Ct. at 2615 (quoting *Thomas*, 473 at 584) (emphasis added).

The Court's conclusion in *Stern* that the creditor-litigant was entitled to an Article III judge in the absence of consent therefore cannot mean, as the Seventh Circuit concluded, that consent and waiver no longer have a meaningful role to play in the Article III analysis. *Stern* holds nothing more than what it says: a litigant who does not consent to the entry of a judgment by the bankruptcy court in a suit "made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789'" is entitled to an Article III judge. *Stern*, 131 S. Ct. at 2609 (quoting *Northern Pipeline*, 458 U.S. at 90) (Rehnquist, J., concurring in judgment). If anything, by highlighting the *lack* of consent in its description of its own holding, 131 S. Ct. at 2615-16, the Court emphasized in *Stern* the critical role consent plays in the constitutional analysis, echoing *Schor's* characterization of Article III rights as "primarily personal." 478 U.S. at 848.

In reaching the opposite conclusion, the Seventh Circuit failed to appreciate the extent to which consent is legally intertwined with the analysis of whether a given adjudicatory regime violates Article III, §1. Its confusion on this point appears to stem from its erroneous conclusion that "*Stern* claims" are different from non-core claims. Pet.App.53a-54a.

The Court, however, held in *Executive Benefits* that §157 "permits '*Stern* claims' to proceed as non-core within the meaning of §157(c)." 134 S. Ct. at 2173.

Had the Seventh Circuit understood that a "*Stern* claim" and a non-core claim are the same, it likely would have reached the opposite result in this case. Although the Seventh Circuit believed that litigant consent could never change the constitutional equation for "*Stern* claims," it stated that when bankruptcy courts decide non-core claims with the litigants' consent pursuant to 28 U.S.C. §157(c)(2), "a strong argument can be made" that "Congress has left the essential attributes of judicial power to Article III courts" because in non-core proceedings the bankruptcy court may enter judgment "only if the parties consent and the district court decides to refer the matter to the bankruptcy court." Pet.App.43a. As explained in Section II.B., *infra*, this conclusion was correct; the Seventh Circuit's error was failing to recognize that when bankruptcy courts decide "*Stern* claims" with litigant consent they are necessarily doing so under §157(c)(2). *Executive Benefits*, 134 S. Ct. at 2173.

B. Allowing Bankruptcy Courts To Decide "*Stern* Claims" With Litigant Consent Upon A District Court's Referral Does Not Violate Article III.

1. The Court Has Long Held That Litigants May Waive Or Forfeit Constitutional Rights That Implicate Structural Concerns.

The Seventh Circuit's conclusion that the structural problems it perceived in §157(b) could never be waived cannot be squared with the Court's jurisprudence rejecting the proposition that structural constitutional challenges enjoy an inviolate right to review. As the Court explained in *Plaut v. Spendthrift Farm, Inc.*: "the proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with our cases." 514 U.S. 211, 231 (1995).[5]

The conclusion that structural constitutional challenges (apart from subject-matter jurisdiction) may be forfeited or waived flows naturally from the

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[5] *Accord Ryder v. United States*, 515 U.S. 177, 182 (1995) (only a litigant "who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question"); *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 397-98 (1990) (refusing to entertain a structural challenge under the dormant commerce clause where the petitioner failed to timely raise the issue).

rule that "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444 (1944). In *Freytag v. Commissioner*, four Justices of the Court in a concurring opinion agreed that creating a special entitlement to review for structural constitutional arguments "that do not call into question the jurisdiction of the forum" "would erode [the] cardinal principle of sound judicial administration" and "has no support in principle or in precedent or in policy." 501 U.S. 868, 895, 898 (1991) (Scalia, J., concurring).

2. Allowing Bankruptcy Courts To Decide "*Stern* Claims" With Litigant Consent Upon A District Court's Referral Does Not Implicate Any Unwaivable Structural Article III Rights.

In this case, no unwaivable structural Article III concerns prevented the parties from choosing to proceed before the bankruptcy court to a final adjudication. As the Court held in *Schor*, Article III "primarily" protects the individual and thus the right to an Article III court is eminently waivable. 478 U.S. at 848.

Article III also protects the structural interest of an independent and autonomous judiciary, but these concerns do not arise in this case. Article III protects

these structural interests by "barring congressional attempts to *transfer jurisdiction* [to non-Article III tribunals] for the purposes of emasculating constitutional courts...." 478 U.S. at 850 (internal citations and quotations omitted) (emphasis added) (original modification). As *Schor* explained, "[t]o the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2." *Id.* at 850-51.

This case does not implicate structural concerns because Congress has not "transfer[red] jurisdiction" to a non-Article III forum: bankruptcy judges operate entirely within the confines of the Judicial Branch and under the direct control of the district courts. In the words of *Schor*, "the power of the federal judiciary to take jurisdiction" is not merely "unaffected." *Id.* at 855. Rather, Congress has expressly preserved it.

The jurisdictional statute at issue—§1334—vests jurisdiction in the district courts over all bankruptcy cases and civil proceedings arising under title 11, or arising in or related to a bankruptcy case. 28 U.S.C. §1334(a), (b). Unlike repealed 28 U.S.C. §1471, the statute the Court held unconstitutional in *Northern Pipeline*, §1334 gives the bankruptcy courts *no* independent authority to exercise the district court's jurisdiction. Under repealed §1471, bankruptcy courts had independent power conferred by Congress

to exercise the district court's jurisdiction. *Executive Benefits*, 134 S. Ct. at 2170-71. Today, under §1334 and §157, the authority of bankruptcy courts to do anything depends entirely on the discretion of district court judges who may refer bankruptcy cases and adversary proceedings to the bankruptcy courts as they see fit. 28 U.S.C. §157(a). Even when a district court makes a reference, it can withdraw that reference *at any time* either "on [the district court's] own motion, or on timely motion of any party." 28 U.S.C. §157(d). A bankruptcy court therefore serves entirely at the pleasure of the district court, just as magistrate judges do under the Federal Magistrates Act (28 U.S.C. §631 *et. seq.*). When referred bankruptcy cases and proceedings, the bankruptcy court exercises the district court's jurisdiction. 28 U.S.C. §1334.

Moreover, the manner in which Congress established the bankruptcy courts demonstrates that when bankruptcy courts exercise federal bankruptcy jurisdiction they are doing so within the confines of the Judicial Branch. BAFJA constitutes bankruptcy courts as "unit[s] of the district court" and designates bankruptcy judges as "judicial officer[s] of the district court" where the bankruptcy court is located. 28 U.S.C. §151. So "while functionally there may appear to be a separate bankruptcy court, for jurisdictional purposes there is only one court, *i.e.*, the district court." *Grewe v. United States (In re Grewe)*, 4 F.3d 299, 304 (4th Cir. 1993) (internal quotations omitted); *accord In re Dorner*, 343 F.3d 910, 914 (7th Cir. 2003) (noting that "[b]ankruptcy

judges and district judges serve on a unified court"); *Browning v. Levy*, 283 F.3d 761, 779 (6th Cir. 2002) ("the bankruptcy court is not a free standing court, but rather a unit of the district court") (internal quotations omitted). The fact that bankruptcy courts are part of the district courts establishes that Congress has not removed jurisdiction from Article III courts.

In the nearly identical circumstance of federal magistrate judges, the Court has held this same level of Article III judicial control sufficient to defeat any structural concerns, when coupled with the parties' consent. *Peretz*, 501 U.S. at 937-38. In *Peretz*, the Court explained that allowing magistrate judges to preside over *voir dire* in felony proceedings with the defendant's consent did not raise structural Article III concerns because "the entire process takes place under the district court's total control and jurisdiction" and thus "there is no danger that use of the magistrate involves a congressional attemp[t] to transfer jurisdiction [to non Article III tribunals] for the purpose of emasculating constitutional courts." *Id.* at 937 (internal quotations omitted) (original modifications).

The same is true of bankruptcy courts. Because bankruptcy courts act entirely under the control and supervision of Article III courts and may only exercise, with the parties' consent, such jurisdiction as Article III courts confer upon them, Congress has not impermissibly transferred the district court's "jurisdiction [to the bankruptcy courts] for the

purpose of emasculating constitutional courts." *Id.* Accordingly, allowing bankruptcy courts to decide "*Stern* claims" with the parties' consent, does not raise "structural" concerns that litigants may not waive or forfeit.

3. The Court Has Consistently Authorized Non-Article III Adjudicators Operating Under The Control Of Article III Courts To Enter Judgments With Litigant Consent.

The touchstone of the Court's Article III jurisprudence has been consent. The Court has consistently upheld the judgments of non-Article III adjudicators when, as is the case under §1334 and §157, the referring court has had subject matter jurisdiction over the suit and possessed the necessary reference authority (either by tradition, statute, or rule) and the parties have consented.

In *Heckers v. Fowler*, for example, "the parties agreed in writing" that the federal district court could refer the cause to a referee and that "the report of the referee [would] have the same force and effect as a judgment of the [district] court." 69 U.S. at 127. The losing party challenged the judgment because an Article III judge did not enter it. *Id.* at 126. Relying on what was already a well-established practice in 1864, the Court upheld the referee's judgment, stating that the "[p]ractice of referring pending actions under a rule of court, by consent of parties, was well known at common law" and further that

"the report of the referees appointed, when regularly made to the court, pursuant to the rule of reference, and duly accepted, is now universally regarded in the State courts as the proper foundation of judgment." *Id.* at 131. The Court held that it "[could] see no objection to the introduction of the same practice into the courts of the United States" and ruled the practice to be "coeval with the organization of our judicial system." *Id.* at 128, 130.

In *Kimberly v. Arms*, the Court reinforced the point that the constitutionality of referred non-Article III adjudications turns on litigant consent. 129 U.S. 512, 516 (1889). There parties asked the district court to appoint a special master and agreed that he would "decide all the issues between the parties...." *Id.* After the special master issued his decision, the district court refused to give it any deference. *Id* at 522. The Court reversed, holding that when the parties consent, the findings of a special master "are to be taken as presumptively correct." *Id.* at 524. To do otherwise, the Court held, would "defeat ... the purpose of the reference, and disregard the express stipulation of the parties." *Id.* at 525.

In the bankruptcy context, the Court has reached the same conclusion. In *Newcomb v. Wood*, the Court rejected a challenge to the referees' decision, stating "[t]he power of a court of justice, *with the consent of the parties*, to appoint arbitrators and refer to a case pending before it, is incident to all judicial administration, where the right exists to

ascertain the facts as well as to pronounce the law. *Conventio facit legem.* In such an agreement there is nothing contrary to law or public policy." 97 U.S. 581, 583 (1878) (emphasis added).

The Court also held that a bankruptcy litigant could waive the right to a trial in the district court in *MacDonald v. Plymouth County Trust Co.*, explaining that "the restriction" that prevented bankruptcy referees from deciding certain plenary matters "may be removed ... by the consent of the parties to a summary trial of the issue presented." 286 U.S. at 268. Again, the Court stressed the importance of consent, emphasizing the "distinction" between "the power of the referee to decide the issues in such a suit brought before him without objection" and his lack of power to compel suit "over the objection of the proposed defendant." *Id.* at 266.

Contrasting two more recent cases, *Gomez v. United States*, 490 U.S. 858 (1989) and *Peretz*, 501 U.S. at 923, makes this same point, underscoring just how crucial consent is to the Article III analysis. Both cases presented the same issue: whether a magistrate judges could preside over felony jury trial selection. In *Gomez*, where the defendant had not consented, the Court held that the Federal Magistrates Act did not authorize this practice, thereby avoiding the constitutional question. 490 U.S. at 875-76. But two years later, in *Peretz*, the "defendant's consent significantly change[d] the constitutional analysis" and the Court had "no trouble concluding that there is no Article III

problem when a district court judge permits a magistrate to conduct *voir dire* in accordance with the defendant's consent." 501 U.S. at 932. Most importantly—and fatally for Sharif's argument—the Court explained in rejecting the structural Article III challenge that *voir dire* oversight is comparable to the power magistrate judges have to enter judgment in civil and misdemeanor trials with litigant consent. *Id.* at 933.

Similarly, the Court ruled in *Roell* that a magistrate judge may preside over a jury trial and enter judgment in a civil action with the express or implied consent of the parties. 538 U.S. at 589-91. Sections 636(c)(1) and (3) of the Federal Magistrates Act authorizes magistrate judges with the parties' consent to conduct "any or all proceedings in a jury or nonjury civil matter" and enter a judgment that is appealable directly to the court of appeals. 28 U.S.C. §636(c)(1), (3). Even though the parties failed to follow the procedural rules for consenting in *Roell*, the Court concluded that implied consent sufficed. The Court reasoned that inferring consent "checks the risk of gamesmanship" and "substantially honor[s]" the Article III right. 538 U.S. at 590. Although the dissent disapproved of implied consent, even the dissent recognized that consensual non-Article III adjudications are permissible: "[r]eading §636(c)(1) to require express consent ... ensures that the parties knowingly and voluntarily waive their right to an Article III judge." *Id.* at 595 (Thomas, J., dissenting).

Consistent with the Court's long-standing precedent authorizing district courts to refer matters to non-Article III adjudicators, the circuit courts have all held that the Constitution permits magistrate judges to enter judgments in civil proceedings with litigant consent.[6] The same result should hold under §157 because Congress modeled §157 on the Federal Magistrates Act. *See* 1 Collier on Bankruptcy ¶3.03.[4] (Alan A. Resnick *et al.* eds., 16th ed. 2013); 130 CONG. REC. E1109 (daily ed. Mar. 20, 1984) (statement by Rep. Kastenmeier) (stating that "[t]he powers that bankruptcy judges exercise" will be "identical to those exercised by magistrates" and will include the power to "enter a binding judgment" so long as "the parties consent").

Therefore, as set forth in Section II.C., *infra*, because Sharif consented to the bankruptcy court

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[6] *See, e.g.*, *Sinclair v. Wainwright*, 814 F.2d 1516, 1519 (11th Cir. 1987); *Bell & Beckwith v. U.S., I.R.S.*, 766 F.2d 910, 912 (6th Cir. 1985); *Gairola v. Va. Dep't of Gen. Services*, 753 F.2d 1281, 1284-85 (4th Cir. 1985); *D.L. Auld Co. v. Chroma Graphics Corp.*, 753 F.2d 1029, 1031-32 (Fed. Cir. 1985); *United States v. Dobey*, 751 F.2d 1140, 1143 (10th Cir. 1985); *Fields v. Washington Metro. Area Transit Auth.*, 743 F.2d 890, 894 (D.C. Cir. 1984); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1041-42 (7th Cir. 1984); *Lehman Bros. Kuhn Loeb Inc. v. Clark Oil & Refining Corp.*, 739 F.2d 1313, 1315 (8th Cir. 1984); *Puryear v. Ede's Ltd.*, 731 F.2d 1153, 1154 (5th Cir. 1984); *Collins v. Foreman*, 729 F.2d 108, 119 (2d Cir. 1984); *Goldstein v. Kelleher*, 728 F.2d 32, 35-36 (1st Cir. 1984); *Pacemaker Diagnostic Clinic of Am., Inc.*, 725 F.2d at 542-43 (*en banc*); *Wharton-Thomas v. United States*, 721 F.2d 922, 929-30 (3d Cir. 1983).

exercising authority over his property, and §157 does not "transfer [the district court's] jurisdiction" over bankruptcy cases and proceedings to another branch of government, the bankruptcy court in this case could, consistent with Article III, enter a judgment on Wellness's §541 claim. *Schor*, 478 U.S. at 850.

4. Even If §157 Raised Structural Article III Concerns, Allowing Bankruptcy Courts To Decide "*Stern* Claims" With Litigant Consent Is Constitutionally Permissible Under The *Schor* Balancing Test.

When litigants consent to bankruptcy courts deciding "*Stern* claims," §157 does not raise unwaivable structural concerns because it does not impinge upon the jurisdiction of Article III courts. Even if it did, though, that would not end the analysis. As the Court explained in *Schor*, Article III eschews "formalistic and unbending rules" "[i]n determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch." 478 U.S. at 851. Instead, the Court views the question "with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." *Id.*

The federal statute at issue in *Schor*, unlike §157, transferred the federal judiciary's jurisdiction

over certain common law claims to the Executive Branch, specifically to a CFTC administrative law judge, and thus did indeed implicate structural concerns. *Id.* at 836-37. Nonetheless, the Court still found that adjudicatory regime constitutional applying a balancing test. *Id.* at 858. The same "practical" considerations that led the Court to uphold the CFTC's authority to decide certain state-law claims apply with equal force in this case.

As with consensual adjudications that occur wholly within the Judicial Branch, the key consideration in *Schor's* analysis of a non-Judicial Branch regime was litigant consent. The Court explained, "it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences." *Id.* at 855.

After recognizing the litigants' consent to the Executive Branch tribunal as highly significant (though not dispositive), the Court proceeded to weigh:

> the extent to which the essential attributes of judicial power are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the

> range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Id. at 851 (internal quotations omitted).

Applying the factors identified in *Schor* to this case demonstrates absolutely no reason to find an Article III violation here. *First*, like the litigant in *Schor* who filed his claims with the CFTC, the debtor Sharif consented to the bankruptcy forum by filing his bankruptcy petition seeking a discharge. *Id.* at 849. Just as the litigant in *Schor* expressly eschewed an Article III forum by moving to stay a parallel district court case, *id.* at 838, 849, Sharif did the same—filing bankruptcy to move his litigation with Wellness from an Article III district court in Texas to the bankruptcy court in Illinois. Pet.App.6a.

Second, as explained in Section II.B.2., *supra*, under §157, the district court retained complete control over the decision to refer Sharif's case to the bankruptcy court and to withdraw it from the bankruptcy court. 28 U.S.C. §157(a), (d). "[S]eparation of powers concerns are diminished" when, as is the case under §157, "the decision to invoke [a non-Article III] forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction" remains. *Schor*, 478 U.S. at 855.

Third, any encroachment on Article III is limited to "a narrow class of common law claims as an incident to the [bankruptcy courts'] primary, and unchallenged, adjudicative function" and therefore "does not create a substantial threat to the separation of powers." *Id.* at 854. Here, of course, the §541 action at issue is not even a common law claim; rather it is a congressionally-created right that "stems from the bankruptcy itself." *Stern*, 131 S. Ct. at 2618. Moreover, the adjudication of this action is not just "incident" to the bankruptcy court's adjudicative authority, it is at the core of federal bankruptcy *in rem* jurisdiction.

Finally, there is no evidence that when Congress gave bankruptcy courts the ability to decide "*Stern* claims," its focus was on impermissibly allocating jurisdiction "among federal tribunals." *Schor,* 478 U.S. at 855. Just as Congress intended in the Commodity Exchange Act to create an inexpensive and expeditious alternative forum within the Executive Branch through which customers and brokers could assert their claims, *id.*, Congress created the current bankruptcy system to assist the district courts in administering a "sometimes unruly [] area of law" efficiently, while continuing to provide the district courts with ultimate control over the bankruptcy courts. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012); *see also* S. REP. NO. 98-55, at 16 (1983) (stating that BAFJA was designed "to give[] the district courts far greater control over the handling of all bankruptcy

cases and proceedings" than the Act that *Northern Pipeline* invalidated).

"In [these] circumstances, the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*." *Schor*, 478 U.S. at 856. Therefore, even if bankruptcy courts are subject to *Schor's* balancing test, allowing bankruptcy courts to decide "*Stern* claims" with litigant consent would still pass constitutional muster.

C. Sharif Consented To The Bankruptcy Court's Entry Of A Judgment.

1. Sharif Expressly Consented To The Bankruptcy Court's Exercise Of *In Rem* Jurisdiction Over His Property.

The bankruptcy court in this case entered judgment on the §541 claim pursuant to a referral from the district court and with the debtor Sharif's express and implied consent. Sharif provided his express consent by voluntarily filing for bankruptcy necessarily understanding that if he did so his property would be subject to the authority of the bankruptcy court. *Central Va. Cmty. College*, 546 U.S. at 363-64; 11 U.S.C. §541(a).

Because a "statute is itself sufficient notice" of the law, Sharif's consent was both knowing and voluntary. *See City of West Covina v. Perkins*, 525 U.S. 234, 241 (1999) (quoting *Reetz v. Michigan*, 188 U.S. 505, 509 (1903)). Bankruptcy Code §541 and §521 placed Sharif on notice that if he filed

bankruptcy, an estate would be automatically created of all of his property, including potentially the purported trust property, and that he would be required to deliver that property to his trustee. 11 U.S.C. §§521(a)(4); 541(a),(d). Section 157(a) likewise placed Sharif on notice that his bankruptcy case likely would proceed in bankruptcy court unless he sought to have the district court withdraw the reference. 28 U.S.C. §157(a).

Sharif also decided to file his petition voluntarily. As the Court explained in *United States v. Kras*, where it held that a debtor did not have a constitutional right to file a bankruptcy case without paying a filing fee, "bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors." 409 U.S. 434, 445 (1973). Sharif chose to file bankruptcy to stay the Texas collection action (where an Article III judge had jailed him for failing to answer discovery). That tactical choice came with the obligation to submit his person and property to the authority of the bankruptcy court. *Central Va. Cmty. College*, 546 U.S. at 363-64.

The fact that Sharif voluntarily chose to file a petition in bankruptcy court and stay the Texas suit distinguishes him from the creditor in *Stern*, whom the Court concluded had "nowhere else to go" to file his claim against the debtor once she filed bankruptcy and thus had not truly consented to proceed in bankruptcy court. 131 S. Ct. at 2614-15. Sharif's voluntary decision to file a bankruptcy

petition (and to enjoy the automatic stay) places him in the same position as the litigants in *Schor*, who had a choice of proceeding on their claims in either federal district court or before a CFTC administrative law judge and complained about their Article III rights only after choosing the CFTC and losing before it. 478 U.S. at 849. Just as the litigants' decision to proceed before the CFTC in *Schor* constituted sufficient consent to overcome their constitutional challenge, *id.* at 847-50, Sharif's decision to file for bankruptcy rather than proceed in the Article III court in Texas constituted consent here.

Holding otherwise would render bankruptcy courts "helpless indeed" to ensure that debtors comply with their obligations under the Code. *Mueller*, 184 U.S. at 14. Section 521(a)(4) commands that debtors must "surrender to the trustee all property of the estate." 11 U.S.C. §521(a)(4). If debtors are allowed to delay and evade that duty by contesting the bankruptcy court's authority over their property while simultaneously enjoying the benefits of the automatic stay and the other advantages of bankruptcy, the bankruptcy system will fail in its essential purpose of "secur[ing] a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period." *See Katchen*, 382 U.S. at 328 (internal quotations omitted).

2. Sharif's Implied Consent Sufficed.

Sharif also implicitly consented to adjudication before the bankruptcy court through his conduct. As discussed above, the Court held in *Roell* that implied consent in the magistrate context suffices. Similarly, in *Thomas v. Arn*, the Court held a party may waive the right to challenge a magistrate judge's ruling on appeal by failing to lodge an objection with the district court. 474 U.S. 140, 147-48 (1985). The Court reasoned that applying a waiver rule prevents litigants "from 'sandbagging' the district judge" and thus promotes "judicial economy." *Id.* In the bankruptcy context, the Court held in *Cline v. Kaplan*, that "[c]onsent to proceed summarily may be formally expressed, or ... may be waived by failure to make timely objection." 323 U.S. 97, 99 (1944).

Sharif's conduct was equivalent to the conduct of the litigants in *Roell*, *Thomas*, and *Cline*. Most significantly, Sharif responded to Wellness's motion for sanctions by filing his own summary judgment motion demanding that the bankruptcy court enter judgment in his favor. Pet.App.10a. "There can be no clearer sign of consent" then asking a court to enter judgment. *In re G.S.F. Corp.*, 938 F.2d 1467, 1477 (1st Cir. 1991). Indeed, by asking the bankruptcy court to rule on his summary judgment motion, Sharif *a fortiori* consented to the bankruptcy court's entry of judgment. Thus, the act of moving for summary judgment is tantamount to express consent.

Sharif also consented by admitting that Wellness's action was a core proceeding in which the bankruptcy court could enter a judgment. 28 U.S.C. §157(b)(1); *see* J.A.24. "Furthermore, by failing to object to the bankruptcy court's assumption of core jurisdiction" Sharif "impliedly consented to the court's entry of final judgment." *M.A. Baheth & Co. v. Schott (In re M.A. Baheth Constr. Co.)*, 118 F.3d 1082, 1084 (5th Cir. 1997).

After he lost, Sharif also failed to raise his constitutional objections properly in either his district court or Seventh Circuit appeals even though the Court decided *Stern* well before Sharif's district court brief was due. Pet.App.15a; No.12-1349, Dkt.13 (7th Cir.). Finding consent from Sharif's conduct therefore "checks the risk of gamesmanship" and is consistent with the Court's decisions in *Roell, Thomas,* and *Cline*. *Roell*, 538 U.S. at 590.

* * *

The basic bargain of bankruptcy is that debtors cede control of their property to their bankruptcy estates in exchange for a fresh start. Each year, over one million individuals and companies take advantage of that bargain, automatically triggering in each of those cases the creation of a bankruptcy estate under §541. This basic bankruptcy bargain would be broken if bankruptcy courts lacked the authority to enter judgments against debtors like Sharif who withhold property in their possession from their bankruptcy estates. *Stern* acknowledged

the authority of bankruptcy courts to decide matters that "stem[] from the bankruptcy." 131 S. Ct. at 2618. That authority should extend to actions against a debtor because allowing voluntary debtors to block the authority of bankruptcy courts to enter orders on such basic bankruptcy determinations would render those courts "helpless indeed." *Mueller*, 184 U.S. at 14.

CONCLUSION

The judgment of the Seventh Circuit should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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ADDENDUM

28 U.S.C.A. § 157

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to--

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party,

whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter

appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

* * *

28 U.S.C.A. § 1334

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts

other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section

362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

* * *

11 U.S.C.A. § 541

§ 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include--

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that--

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a

farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title;

(5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but--

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds--

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $6,225[1];

(6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined in section 529(b)(1) of such Code) not later than 365 days before the date of the filing of the petition in a case under this title, but--

(A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;

(B) with respect to the aggregate amount paid or contributed to such program having

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[1] Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(6) of such Code with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and

(C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $6,225[1];

(7) any amount--

(A) withheld by an employer from the wages of employees for payment as contributions--

(i) to--

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title; or

(B) received by an employer from employees for payment as contributions--

(i) to--

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where--

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b); or

(9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made--

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor),

unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law--

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a cus-

todian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e) In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal place of abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.

(f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

RESPONDENT'S BRIEF

No. 13-935

IN THE

Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LIMITED, ET AL.,
Petitioners,

v.

RICHARD SHARIF,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

1. Whether, consistent with Article III of the United States Constitution and *Stern v. Marshall*, 131 S. Ct. 2594 (2011), a bankruptcy court may enter a final judgment on a common law "alter ego" claim that seeks to extinguish the property interests of third parties in the assets of a trust for which the debtor served as trustee, and to augment the debtor's bankruptcy estate with those trust assets.

2. Whether a litigant's consent suffices to cure the unlawful assignment of the "judicial Power of the United States" to an Article I tribunal, and if so, whether the respondent here consented *expressly*, as specifically required by Federal Rule of Bankruptcy Procedure 7012(b), or otherwise consented knowingly and voluntarily.

PARTIES TO THE PROCEEDING

Petitioners are Wellness International Network, Limited, Ralph Oats, and Cathy Oats (collectively, "Wellness"), plaintiffs-appellees below.

Respondent is Richard Sharif, the debtor and appellant below.

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INTRODUCTION

The bankruptcy court in this case entered final judgment on a claim it had no authority to adjudicate. The claim sought to bring into respondent's bankruptcy estate assets owned by the Soad Wattar Living Trust—a trust established by respondent's mother, Soad Wattar, many years before respondent became indebted to petitioner. The only parties with property interests in those assets were the Trust, Wattar herself before her death, and respondent's sister, the Trust's beneficiary. Respondent was merely the trustee, and thus had no property interest in the assets of the Trust. They accordingly did not become part of his estate when he declared bankruptcy. *See, e.g., United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.10 (1983) ("Congress plainly excluded [from the bankruptcy estate] property of others held by the debtor in trust at the time of the filing of the petition."). Petitioners nevertheless sought to augment the bankruptcy estate with the assets of the Trust, on the basis of an "alter ego" claim asserting that the assets owned by the Trust should be treated as assets owned by respondent because treating them as separate would be unjust to petitioners.

That claim is wrong on its merits, but what matters for present purposes is that it is not a claim the bankruptcy court could finally resolve. Petitioners' alter ego claim is a private, common law claim seeking to extinguish property rights of third parties, i.e., the Trust and respondent's sister. There is no serious argument that such a claim falls within the bankruptcy court's authority to allocate assets owned by the estate—authority that has always been understood as *excluding* the power to adjudicate bo-

na fide claims of third parties to ownership of property in their possession. In the language of this Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), common law claims seeking to "augment the bankruptcy estate" with property interests owned by third parties cannot be adjudicated by the bankruptcy court because they are not claims derived from or dependent on bankruptcy law. *Id.* at 2615-16.

As *Stern* makes clear, the Constitution reserves the adjudication of such claims in the federal system exclusively to courts duly constituted under Article III, rather than tribunals controlled by Congress or the Executive. A debtor cannot by its own consent alter that constitutionally mandated structure, especially where, as here, the private rights at issue include property rights of a third party—respondent's sister—who not only did not consent, but who affirmatively sought to prevent the bankruptcy court from adjudicating her rights. And even if the debtor's own consent could be enough in theory to justify the bankruptcy court's exercise of Article III power to adjudicate private rights, respondent here never provided such consent—and he certainly did not consent *expressly*, as Bankruptcy Rule 7012(b) specifically requires for claims like the alter ego claim petitioners assert. The judgment should be affirmed.

STATEMENT OF THE CASE

A. Legal Background

1. A debtor's decision to file a bankruptcy petition under Chapter 7 "creates a bankruptcy 'estate' generally comprising all of the debtor's property." *Law v. Siegel*, 134 S. Ct. 1188, 1192 (2014). Bankruptcy jurisdiction "is principally *in rem* jurisdiction." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356,

369 (2006). Defining the bankruptcy estate is thus a critical first step in bankruptcy proceedings, because it establishes the pool of assets within the bankruptcy court's jurisdiction, and from which the bankruptcy court can "distribut[e] ... property among the debtor's creditors" and thus facilitate the "ultimate discharge that gives the debtor a 'fresh start.'" *Id.* at 363-64.

Section 541 of the Bankruptcy Code describes the property that may be included in the bankruptcy estate. Most fundamentally, the estate contains "all legal or equitable interests *of the debtor* in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (emphasis added); *see* 28 U.S.C. § 1334(e)(1) (district court where bankruptcy case is commenced has "exclusive jurisdiction" over "all the property, wherever located, *of the debtor* as of the commencement of such case" (emphasis added)). The estate at commencement thus includes only property interests of the debtor at the time of bankruptcy—federal bankruptcy law "does not authorize a trustee to distribute *other people's* property among a bankrupt's creditors." *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 135-36 (1962) (emphasis added). And because property interests "not owned by a bankrupt at the time of adjudication, whether complete or partial, legal or equitable ... are of course not a part of the bankrupt's property," they are not part of the bankruptcy estate either. *Id.* at 135.

While § 541 specifies which of the debtor's property interests are included in the estate, § 541 does not determine in the first instance whether the debtor owns a given property interest. Instead, "[p]roperty interests are created and defined by state law." *Butner v. United States*, 440 U.S. 48, 55

(1979). There is no "federal common law of property rights." *Bishop v. Wood*, 426 U.S. 341, 349 n.14 (1976).

2. Under the Bankruptcy Act of 1898, the bankruptcy estate—and hence the bankruptcy court's "summary jurisdiction"[1]—was strictly limited to the property in the debtor's "actual or constructive" possession at the time of the bankruptcy. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53 (1982) (plurality opinion); *see infra* at 29-32. Accordingly, when property was possessed by a third party with a "bona fide claim adverse to the receiver or trustee in bankruptcy," the rights to the property had to be "adjudicated in suits of the ordinary character, with the rights and remedies incident thereto." *Cline v. Kaplan*, 323 U.S. 97, 98-99 (1944) (quotation omitted).

Under the foregoing rule, bankruptcy courts could resolve "claims regarding the apportionment of the existing bankruptcy estate among creditors," but if a claim sought "to *augment* the bankruptcy estate" with property of a third party with a bona fide ownership claim, the proceeding "implicated the district court's plenary jurisdiction and [was] not referred to the bankruptcy courts absent both parties' consent." *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2170 (2014) (emphasis added).

3. In 1978, "Congress enacted sweeping changes to the federal bankruptcy laws," eliminating "the

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[1] Under the 1898 Act, the federal district courts served as bankruptcy courts and could "refer matters within the traditional 'summary jurisdiction' of bankruptcy courts to specialized bankruptcy referees." *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2170 (2014).

historical distinction" between summary and plenary jurisdiction. *Id.* The 1978 Act instead "mandated that bankruptcy judges 'shall exercise' jurisdiction over 'all civil proceedings arising under title 11 or arising in or related to cases under title 11.'" *Id.* at 2170-71 (quotation omitted). With "a few limited exceptions," the Act vested bankruptcy court judges "with all of the 'powers of a court of equity, law, and admiralty.'" *Id.* at 2171 (quotation omitted). But bankruptcy judges were still "not afforded the protections of Article III—namely, life tenure and a salary that may not be diminished." *Id.*

In *Northern Pipeline*, this Court held that the 1978 Act's assignment to bankruptcy courts of the authority to decide a "state-law contract claim" against a person or entity not party to the bankruptcy "violate[d] Art. III of the Constitution." 458 U.S. at 56, 87 n.40 (plurality opinion); *see id.* at 91 (Rehnquist, J., concurring). The Court distinguished "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power," and hence may be subject to adjudication by Article I courts, from "the adjudication of state-created private rights," which are constitutionally restricted to Article III courts. *Id.* at 71 (plurality opinion).

4. Congress subsequently enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984, which gives federal district courts "original and exclusive jurisdiction of all cases under title 11," 28 U.S.C. § 1334(a), and permits district courts to refer to bankruptcy judges "proceedings arising under title 11 or arising in or related to a case under title 11," *id.* § 157(a). Bankruptcy judges serve 14-year terms subject to removal for cause, and their

salaries are set by Congress. *Id.* §§ 152(a)(1), (e), 153(a).

The 1984 Act "divid[es] all matters that may be referred to the bankruptcy court into two categories: 'core' and 'non-core' proceedings." *Arkison*, 134 S. Ct. at 2171; *see* 28 U.S.C. § 157. The bankruptcy court must determine whether each claim before it is core or non-core. 28 U.S.C. § 157(b)(3). Section 157(b)(2) contains a non-exhaustive list of examples of core matters, such as "matters concerning the administration of the estate," "allowance or disallowance of claims against the estate," and "objections to discharges." *Id.* § 157(b)(2)(A),(B),(J). Bankruptcy judges can "hear and determine" such claims and "enter appropriate orders and judgments" on them. *Id.* § 157(b)(1). A "final judgment" entered in a core proceeding is appealable to the district court, *id.* § 158(a)(1), which reviews the judgment under traditional appellate standards, including deference to bankruptcy-court factfinding. Fed. R. Bankr. P. 8013.

As for "non-core" proceedings—those that are "not ... core" but are "otherwise related to a case under title 11"—§ 157(c)(1) authorizes bankruptcy courts to "hear [the] proceeding" and "submit proposed findings of fact and conclusions of law to the district court," which reviews them de novo and enters final judgment. Section 157(c)(2) also provides, however, that if all parties "consent," a bankruptcy judge may adjudicate and enter a final judgment on non-core matters. The parties' "consent" to a bankruptcy court's adjudication of a non-core matter must be "express." Fed. R. Bankr. P. 7012(b).

5. In two recent cases—*Stern* and *Arkison*—this Court effectively refined Congress's designation and treatment of "core" and "non-core" matters under § 157. In *Stern*, the Court held that even a claim designated as "core" in § 157 cannot *constitutionally* be adjudicated by the bankruptcy court if the claim is, in substance, merely a common law claim that seeks to "augment the bankruptcy estate" with assets owned by a third party. 131 S. Ct. at 2616. Such claims are reserved in the federal system exclusively to the jurisdiction of Article III courts. *Id.* at 2615.

In *Arkison*, the Court held that while bankruptcy courts cannot finally adjudicate such claims, they may *consider* such claims pursuant to the procedure established by § 157(c) for adjudicating "non-core" matters—i.e., by submitting proposed findings of fact and conclusions of law to the district court, subject to de novo review and entry of final judgment by that court. *See* 134 S. Ct. at 2172-74.

B. Proceedings Below

1. *The Soad Wattar Living Trust*

Respondent introduced evidence in the bankruptcy proceeding establishing the following facts. Respondent Richard Sharif was one of eight children raised by Abdul Hadi Sharifeh and his wife Soad Wattar. S.A. 2-3.[2] When Sharifeh died in Syria in 1988, he left his estate to Wattar. At the time, their children were living in the United States, primarily in the Chicago area.

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[2] "S.A." denotes Respondent's Supplemental Appendix submitted with this brief.

In early 1992, Wattar joined her family in Chicago and adopted a U.S.-style estate plan. S.A. 7, 24. Her plan took the form of the Soad Wattar Living Trust (the "Trust")—a revocable living trust designed to hold her assets for her benefit during her life and to pass them to the Trust's beneficiary upon her death.

Wattar executed the original trust documents on January 17, 1992. S.A. 5-7, 46. She was the settlor of the Trust and funded it with approximately $2 million. S.A. 5, 77. Wattar appointed Sharif as trustee. S.A. 10, 46.

Because the Trust was a revocable living trust, Wattar owned the beneficial interest in the Trust's assets during her lifetime. *See, e.g., Amonette v. IndyMac Bank, F.S.B.*, 515 F. Supp. 2d 1176, 1184 (D. Haw. 2007) ("Because a settlor of a revocable living trust retains an unlimited right to revoke any conveyance to the revocable living trust, it has an unfettered ownership interest even though title is legally held by the trust." (citing *Engelke v. Estate of Engelke*, 921 So.2d 693, 696 (Fla. App. 2006))). The Trust filed its own federal and state tax returns at least from 2002 through 2009, which indicated that Wattar received all income generated by the Trust assets. S.A. 35.

The Trust was amended at least three times. S.A. 8-9, 22-26. The last amendment, on October 8, 2007, designated Sharif's sister Ragda Sharifeh ("Ragda") as the sole beneficiary upon Wattar's death. S.A. 36. As death beneficiary, Ragda also possessed an equitable remainder interest in the Trust assets, which qualifies as a vested property interest under Illinois law. *See In re Estate of*

Michalak, 934 N.E.2d 697, 707 (Ill. App. 2010); *In re Estate of Zukerman*, 578 N.E.2d 248, 253 (Ill. App. 1991). Wattar subsequently moved back to Syria, where she died on March 17, 2010. S.A. 19, 30. With Wattar's death, Ragda became entitled to all Trust assets under Illinois law. *See Michalak*, 934 N.E.2d at 707.

2. *The Texas Litigation*

Wellness markets health-oriented nutritional products. In 2003, Sharif and seven co-plaintiffs—all of whom had entered into distributorship contracts with Wellness—sued Wellness in federal district court in Texas, claiming that Wellness was operating a pyramid scheme. Pet. App. 4a.

The district court concluded that the plaintiffs had failed to respond to Wellness's discovery requests, and accordingly deemed material facts admitted against the plaintiffs. Pet. App. 4a-5a. The district court then granted Wellness's summary judgment motion, and the Fifth Circuit affirmed. Pet. App. 5a. In July 2008, the district court awarded Wellness $655,596.13 in attorneys' fees. Pet. App. 5a-6a.

3. *Sharif's Bankruptcy Petition*

On February 24, 2009, Sharif filed a voluntary Chapter 7 petition in the bankruptcy court for the Northern District of Illinois. Pet. App. 6a. Sharif's debts included the attorneys' fees he owed Wellness. Pet. App. 6a-7a. Wellness filed a proof of claim in Sharif's bankruptcy case. Pet. App. 7a.

The creditors' meeting required by Code § 341 commenced on March 25, 2009. *Id.* Wellness questioned Sharif about a loan application he had signed

in 2002, which included several valuable assets not listed in the schedule of assets he filed with the bankruptcy court. Pet. App. 72a.[3] Sharif explained that he did not personally own the assets listed on the loan application. Pet. App. 7a. Instead, the assets belonged to his sisters or their companies, or to the Trust. *Id.*; J.A. 32; S.A. 4-5. As Sharif later elaborated, he had signed the loan application in an effort to help his mother (the living beneficiary of the Trust) purchase a home, and the bank's loan officer had prepared the application—this being 2002, after all—and listed assets belonging to the Trust and his sisters. S.A. 4; *see also* J.A. 30, 36, 38, 41-43. Ragda later confirmed that she directed Sharif to list her assets on the application "in order to secure a loan for her mother." Pet. App. 77a. Sharif testified that he was not actually the borrower on the loan nor the owner of the home. Rather, initially the home was owned, and the loan was owed, by a company controlled by Ragda, and shortly thereafter both the home and the loan were transferred to the Trust. S.A. 10-16.

4. *Wellness's Adversary Proceeding*

a. On November 3, 2009, Wellness commenced an adversary proceeding against Sharif, individually and as trustee of the Trust. Pet. App. 8a, 72a. Counts I through IV of Wellness's complaint asserted that Sharif had concealed his assets and therefore was not entitled to a discharge of his debts under Code § 727. Pet. App. 8a, 73a; J.A. 13-19.

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[3] Those assets included three businesses valued at $2.4 million, three parcels of property valued at $1.4 million, a retirement account valued at $1.4 million, and three bank accounts with $180,000 in cash. Pet. App. 71a.

Count V, in contrast, did not invoke any Code provision. Instead, it sought a "declaratory judgment that the [Trust] is the alter ego of [Sharif] and that all assets of the Trust should be treated as part of [the] estate." J.A. 21. Count V alleged that there was such a "unity" between Sharif and the Trust that their "separateness" had ceased and that excluding Trust assets from Sharif's estate "would result in injustice." J.A. 20.

b. Bankruptcy Rule 7008(a) requires that an adversary complaint aver whether the proceeding is core or non-core under § 157 and, if non-core, indicate whether the plaintiff consents to the entry of a final judgment by the bankruptcy judge. Wellness's complaint alleged (J.A. 6) that the proceeding was core under § 157(b)(2)(J), which defines as core an objection to a bankruptcy discharge. That designation applied to the discharge objections in Counts I-IV. But it could not have encompassed the Count V alter ego claim, which asserted no discharge objections.

Sharif answered the complaint on January 12, 2010, over a year before this Court decided *Stern*. Sharif's answer admitted that the complaint alleged a "core" objection to discharge under § 157(b)(2)(J). J.A. 24. Under Seventh Circuit law at the time, bankruptcy courts had authority to finally adjudicate claims designated as "core" under § 157(b)(2). *See In re Ortiz*, 665 F.3d 906, 910 (7th Cir. 2011).

5. *The Default Judgment*

The bankruptcy court did not enter final judgment based on the merits of Wellness's claims, but solely as a sanction for discovery violations. Pet. App. 117a-18a. On February 10, 2010, Wellness

served discovery requests, with responses due March 15. Pet. App. 8a, 73a. Sharif's deposition was scheduled for March 24. Pet. App. 73a. On March 12, Sharif's counsel requested an extension of time to complete discovery, informing the court that Sharif had traveled to Syria to attend to his gravely ill mother. Pet. App. 9a, 73a-74a. Sharif was still abroad on March 24, when his counsel filed a motion to postpone his deposition and delay his discovery responses. Pet. App. 73a. The bankruptcy court denied the motion. *Id.*

On April 15, 2010, Wellness filed a motion for sanctions and, in the alternative, to compel discovery. J.A. 46-129. Sharif attached to his response documents proving that he had been out of the country since March 5, along with a copy of his mother's death certificate. J.A. 132, 135-39. On April 21, the bankruptcy court granted Wellness's motion to compel, granting Sharif just one week to comply with all outstanding discovery requests. J.A. 140.

On April 27, Sharif produced approximately 1,500 pages of discovery. Pet. App. 73a. He was deposed on May 10. *Id.* Sharif's documents and testimony set forth extensive evidence establishing the validity and longstanding independence of the Trust. *See supra* at 7-9. Sharif also elaborated the circumstances surrounding the 2002 loan application's invocation of Trust assets. *See supra* at 9-10.

By May 23, Sharif had produced thousands of pages of documents. J.A. 143. On May 24, the bankruptcy court held a hearing to determine whether Sharif was in compliance with its April 21 order. Pet. App. 74a. On June 22, Sharif moved for summary judgment. Pet. App. 10a.

On July 6, 2010, the bankruptcy court entered a default judgment against Sharif as "a sanction for [his] failure to comply with discovery requests." Pet. App. 117a-18. The judgment denied Sharif a discharge under Code § 727 and extinguished Ragda's rights in the assets of the Trust, declaring it to be "the alter ego of the Defendant Richard Sharif because he treats its assets as his own property and it would be unjust to allow Debtor to maintain that the trust is a separate entity." Pet. App. 74a-75a, 119a.

6. *Appellate Proceedings*

a. Sharif appealed the bankruptcy court's final judgment to the district court, arguing that the bankruptcy court had erred in entering a default judgment. Pet. App. 15a, 76a-77a.

On December 12, 2011, Ragda filed a motion in the district court under § 157(d) to "withdraw the reference"—i.e., to have the district court reclaim jurisdiction over the case. Pet. App. 15a. Citing *Stern*, Ragda argued that the bankruptcy court lacked jurisdiction to enter a final judgment on Wellness's complaint. *Id.*[4] A month later, Sharif filed a motion for supplemental briefing on *Stern* and the Seventh Circuit's decision in *Ortiz*, 665 F.3d 906. *Id.*

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[4] This was not Ragda's first effort to protect her property interest in the Trust. After learning that the bankruptcy court had entered a default judgment declaring the Trust her brother's alter ego, Ragda filed an adversary complaint in the bankruptcy court alleging that the bankruptcy trustee had wrongfully converted the Trust's assets and seeking a declaration that she was the beneficiary of the Trust. Pet. App. 77a. The bankruptcy court dismissed her complaint. *Id.* Ragda's appeal has been stayed pending this Court's disposition of this case. S.A. 91-92.

The district court denied both motions as untimely and affirmed the bankruptcy court's judgment. Pet. App. 16a. The court held the challenge to bankruptcy court jurisdiction waived and rejected both of Sharif's claims on the merits, reviewing the bankruptcy court's factual findings for clear error and its decision to enter a default judgment for abuse of discretion. *Id.*

b. On appeal, the Seventh Circuit affirmed the bankruptcy court's disposition of Counts I-IV. Pet. App. 66a.

As to the Count V alter ego claim, the court concluded that Sharif had admitted that the entire adversary complaint stated a "core" discharge objection under § 157(b)(2)(J), and thus "proceed[ed] on the assumption that the alter-ego claim was a core proceeding" as a matter of statute. Pet. App. 21a. But the court agreed with Sharif that as a *constitutional* matter, the bankruptcy could not enter final judgment on the alter ego claim. As the court explained, Wellness's claim that Sharif was the alter ego of the Trust—and thus that Trust assets could be declared Sharif's assets, depriving Ragda of her rights in them—was "indistinguishable" in "almost all material respects" from the claims addressed in *Stern* and *Northern Pipeline*. Pet. App. 48a. Like those claims, the alter ego claim "is a common law claim" and "is intended only to augment the bankruptcy estate." *Id.* The bankruptcy court accordingly had no authority to render final judgment on that claim. Pet. App. 51a.

The court further concluded that "a litigant may not waive an Article III, § 1, objection to a bankruptcy court's entry of final judgment in a core proceed-

ing." Pet. App. 45a. The question whether the bankruptcy court could constitutionally adjudicate Wellness's alter ego claim under *Stern* concerned "the allocation of authority between bankruptcy courts and district courts" under Article III and thus "implicate[d] structural interests," Pet. App. 42a, making it nonwaivable.

SUMMARY OF ARGUMENT

I. The bankruptcy court lacked constitutional authority to finally adjudicate Wellness's alter ego claim. Bankruptcy courts may resolve "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res," *Stern*, 131 S. Ct. at 2614, but not common law claims that seek to "augment the bankruptcy estate" with the property of third parties, *id.* at 2616. Wellness's alter ego claim falls in the latter category.

A. Wellness contends that the bankruptcy court could render final judgment on the alter ego claim based on its authority under § 541 to determine which property of the debtor should be included in the bankruptcy estate. That argument rests on the false premise that because Sharif was trustee of the Trust, the Trust's assets became part of the estate under § 541. Under Illinois law, however, the Trust was a distinct legal entity with full ownership rights in the Trust assets. As trustee, Sharif possessed only "bare legal title"—a valueless interest allowing him to administer the Trust. Under both this Court's precedents and § 541, the Trust assets did not automatically become part of the bankruptcy estate at its commencement. Wellness's alter ego claim thus did not seek to determine whether Sharif's property should be included in the bankruptcy

estate, but instead ought *to augment* the bankruptcy estate with third-party property.

B. That claim is precisely the type of claim that must be adjudicated by an Article III court.

The alter ego claim is identical in all material respects to the claim in *Stern*. It is a common law claim designed to augment Sharif's estate with property interests owned by a third party. And it does not implicate the core bankruptcy function of reordering Sharif's debts—it does not ask the court to distribute or otherwise administer assets already within the estate, but instead seeks to add third-party assets to the estate.

Firmly established historical practice prohibited bankruptcy courts from seizing property owned and possessed by legally distinct third-party entities. Bankruptcy courts were authorized to decide whether assets indisputably within the debtor's actual or constructive possession were part of the bankruptcy estate, but they could not adjudicate bona fide claims by third parties to ownership of property in their possession.

The Solicitor General's argument that Wellness's alter ego claim is governed by a "federal rule of decision," based on *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1941), is both wrong and irrelevant. Illinois law determines the underlying property rights in the Trust assets, as Wellness concedes. *Sampsell* did not create or apply a federal common law alter ego rule. Moreover, the particular source of law for a claim is ultimately irrelevant—even if a claim is codified in the Bankruptcy Code, it must be finally adjudicated by an Article III court if, as here, the claim in substance resembles a common

law claim seeking to augment the estate with third-party assets.

The Solicitor General also errs in arguing that the bankruptcy court had authority to adjudicate the alter ego claim because it had authority to adjudicate Wellness's discharge objections, which indisputably implicate "core" bankruptcy powers. Unlike the discharge objections, the alter ego claim requires adjudication of third-party property interests, which is precisely why a bankruptcy court cannot finally resolve it.

C. Wellness's argument that it would be impractical to prohibit bankruptcy courts from entering final judgment on alter ego claims is irrelevant to the scope of their constitutional authority. It also rests on the mistaken assumption that district courts would be required to enter final judgment on *all* state-law disputes. Sharif instead argues only that Article III courts must finally decide claims seeking to augment the estate with third-party property. And even in those cases, bankruptcy courts would have authority to litigate the claim and issue proposed findings of fact and conclusions of law.

II. A bankruptcy court's final adjudication of a private rights claim (like the alter ego claim here) is a structural Article III violation that cannot be cured by consent of private parties. And even if consent mattered, there must be *express* consent, which Sharif did not provide.

A. Private parties cannot consent to a reordering of the separation of powers, which protects liberty by restricting the authority of each branch as against the others. In particular, Article III protects the rights of individuals by ensuring that their pri-

vate rights are adjudicated in the federal system by neutral and independent judges with life tenure and salary protection (and juries in appropriate cases), rather than by tribunals subject to legislative and executive manipulation. This Court's precedents—particularly *Stern* and *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986)—confirm that litigant consent and litigation conduct cannot eliminate the structural threat to liberty posed by allowing non-Article III courts to exercise the judicial power of the United States. Allowing litigant consent to cure the Article III violation here would be particularly inappropriate because Wellness's alter ego claim seeks to adjudicate the property rights of *third parties*, who not only never consented to bankruptcy court jurisdiction, but affirmatively sought to withdraw the case from the bankruptcy court and pursue Article III adjudication.

B. Even if litigant consent could waive an Article III violation, the waiver would have to be knowing and voluntary. And in the bankruptcy context, Rule 7012(b) goes even further, requiring *express* consent to a bankruptcy court's final adjudication of "non-core" matters. The conduct Wellness identifies as demonstrating Sharif's supposed consent here does not remotely qualify as express consent—or knowing and voluntary consent in any respect—to non-Article III adjudication.

C. The Article III violation in this case was not and could not be cured by Sharif's failure to raise it on appeal. The structural violation cannot be forfeited for the same reason it cannot be waived. And the violation deprived the district court of appellate jurisdiction, a defect that can be raised at any time.

ARGUMENT

I. THE BANKRUPTCY COURT LACKED THE CONSTITUTIONAL AUTHORITY TO ENTER A FINAL JUDGMENT ON WELLNESS'S ALTER EGO CLAIM

This Court's decision in *Stern* draws a clear, administrable distinction between matters that bankruptcy courts may finally adjudicate, and those that must be adjudicated by Article III courts. Bankruptcy courts may resolve "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res," 131 S. Ct. at 2614 (quotation omitted), but they cannot resolve private, common law claims that "simply attempt[] to augment the bankruptcy estate" with property owned by third parties, *id.* at 2616.

The *Stern* rule derives from a distinction this Court has long recognized between private rights, which Congress cannot "withdraw from judicial cognizance," and "public rights," which Congress "may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855). The Court first applied that distinction to the bankruptcy context in *Northern Pipeline*, in which a majority of Justices agreed that bankruptcy courts could not "constitutionally be vested with jurisdiction to decide [a] state-law contract claim" filed in bankruptcy court by a debtor against a third party. 458 U.S. at 56, 87 n.40 (plurality opinion); *see id.* at 91 (Rehnquist, J., concurring in judgment). The debtor's contract claim against the third party did not involve a "public right" under the bankruptcy power, the plurality ex-

plained, because the claim did not seek to "restructur[e] ... debtor-creditor relations, which is at the core of the federal bankruptcy power," but instead sought merely to "augment the estate" by "adjudicati[ng] ... state-created private rights." *Id.* at 71.

The Court drew the same distinction in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), holding that a trustee's "fraudulent conveyance" action under 11 U.S.C. § 548(a)(2) to recover assets from a third party could not be "assign[ed]" by Congress "to a specialized non-Article III court lacking the essential attributes of the judicial power," where a jury trial would be unavailable. 492 U.S. at 53 (quotation omitted). Congress could, the Court explained, create "public rights" and "assign their adjudication to an administrative agency with which a jury trial would be incompatible." *Id.* at 51 (quotation omitted). But fraudulent conveyance claims fall outside that "public rights" category because they are "quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Id.* at 56.

In *Stern*, the Court applied the same distinction to a debtor's tort claim seeking to obtain assets from a party with a claim against the estate. Because the debtor's claim was asserted as a counterclaim, it fell within the sixteen matters designated by Congress in § 157(b) as "core" matters subject to final adjudication by a bankruptcy court. *See* 28 U.S.C. § 157(b)(2)(C). The Court held, however, that Article III prohibited Congress from authorizing a bankruptcy court to enter final judgment on the debtor's

claim. The claim, the Court emphasized, did not implicate "public rights" because it was "neither derive[d] from nor depend[ent] upon any agency regulatory regime." 131 S. Ct. at 2615. Rather, the tort counterclaim was "one at common law that simply attempts to augment the bankruptcy estate—the very type of claim that we held in *Northern Pipeline* and *Granfinanciera* must be decided by an Article III court." *Id.* at 2616.

In this case, Wellness contends that its "alter ego" claim against Sharif fits within the "public rights" category subject to Article I adjudication because the claim arises from the bankruptcy court's obligation under § 541 "to determine which of the debtor's assets actually fall within the estate." Petr. Br. 22; *see* U.S. Br. 14.

Wellness's argument rests on a single fundamentally incorrect premise, *viz.*, that Sharif possessed a property interest in the Trust assets. He did not. As trustee, Sharif held no legal or equitable interest in the Trust's assets. Those assets accordingly were not made part of his bankruptcy estate at its commencement—indeed they were affirmatively excluded from the estate. The only way they could be brought into the estate is through a claim *seeking to bring them into the estate*, by extinguishing the competing property interests of third parties in the same assets. Wellness's alter ego claim is just such a claim, which is exactly the kind of claim that cannot be—and historically has not been—adjudicated by an Article I tribunal.

A. Because Sharif As Trustee Did Not Possess Any Property Interest In The Trust Assets, The Assets Did Not Automatically Become Part Of The Bankruptcy Estate

Wellness's entire argument presupposes that because Sharif was the trustee of the Trust when he declared bankruptcy, Sharif himself possessed a property interest in the Trust assets. Petr. Br. 12, 13, 14, 15, 20, 22, 24, 27, 31, 32, 33, 37, 39, 40. On the basis of that premise, Wellness says this case is controlled by the unexceptional authority of the bankruptcy court under § 541 "to determine which of the debtor's assets actually fall within the estate." *Id.* at 22.

Wellness's § 541 argument fails at its "foundational" (*id.* at 23) premise: although Sharif was trustee of the Trust, that service obligation never gave him any legal or equitable interest in the Trust assets themselves. Under Illinois law, "a written trust ... possesses a distinct legal existence." *Pierce v. Chester Johnson Elec. Co.*, 454 N.E.2d 55, 57 (Ill. App. 1983). That distinct legal entity—not Sharif—owned the Trust assets. *See Richard W. McCarthy Trust v. Ill. Cas. Co.*, 946 N.E.2d 895, 904 n.6 (Ill. App. 2011) ("[T]here is no question under Illinois law that the change in the name on the notes from McCarthy individually to McCarthy as trustee of the trust was a change in the ownership of the notes. The trust is a separate legal entity.").

As trustee, Sharif was a "'mere representative'" of the Trust's interests. *Fletcher v. Fletcher*, 380 S.E.2d 488, 491 (Va. 1997) (quoting George T. Bogert, The Law of Trusts & Trustees § 961, at 2 (2d

ed. 1983)). In that capacity he possessed at most "'bare' legal title," which simply permits a trustee to exercise "administrative powers" on behalf of the trust. Restatement (Third) of Trusts § 42, cmt. a (2003) ("Restatement"); *see In re Pfister*, 749 F.3d 294, 297 (4th Cir. 2014) (trustee's "bare legal title" is "a valueless asset"). It is the trust *beneficiary* who possesses the "beneficial interests (or 'equitable title') in the trust property." Restatement § 42 cmt. a. Under Illinois law, once Ragda was named death beneficiary, Wattar and Ragda were the only individuals with equitable interests in the Trust assets. *See supra* at 8-9.

Because Sharif as trustee did not possess property interests in the Trust assets when he declared bankruptcy, those property interests did not automatically become part of the estate at its commencement. Property interests "not owned by a bankrupt at the time of adjudication, whether complete or partial, legal or equitable ... are of course not a part of the bankrupt's property." *Pearlman*, 371 U.S. at 135. It follows that, as the Court has repeatedly recognized, where a debtor is "at most a trustee of the bare legal title" of property owned by another person or entity, the property itself does not become part of the bankruptcy estate. *State Bank of Hardinsburg v. Brown*, 317 U.S. 135, 137 (1942); *see Whiting Pools*, 462 U.S. at 204 n.8 (the bankruptcy estate does not include "property of others in which the debtor had some minor interest such as a lien or bare legal title"); *see also* George T. Bogert, Trusts § 32, at 107 (6th ed. 1987) ("Since the trustee's title is not a beneficial one and his holding is as a representative only, his property interest is not one which

gives his personal creditors any right to take his property....").

Wellness's singular focus on the bankruptcy court's authority over estate assets pursuant to § 541 thus simply misses the point: the estate at commencement includes only *the debtor's* property interests, *see supra* at 3, and Sharif as trustee had no property interests in the Trust assets. Indeed, § 541 confirms that the Trust assets are *excluded* from the estate. Section 541(d), for example, provides that "[p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest ... becomes property of the estate ... only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." Similarly, § 541(b)(1) excludes from the estate "any power that the debtor may exercise solely for the benefit of an entity other than the debtor." Under that provision, where a debtor holds the "property of others ... in trust at the time of the filing of the petition," that property is "plainly excluded" from the bankruptcy estate. *Whiting Pools*, 462 U.S. at 205 n.10.

Wellness accordingly errs in invoking the bankruptcy court's authority under § 541 over property interests *owned by the debtor* as the basis for the bankruptcy court's conclusive authority over property interests *owned by the Trust and Ragda*. Petr. Br. 20. Contrary to Wellness's submission, the alter ego claim does not seek merely to *define* the contours of the bankruptcy estate by determining which property interests owned by Sharif should be included in the estate. The claim instead seeks to *augment* the estate with property interests owned by third par-

ties. That kind of claim can be adjudicated only by an Article III court, as explained below.

B. Wellness's Common Law Claim To Augment The Estate With Property Interests Owned By Third Parties Must Be Adjudicated By An Article III Court

Because Wellness's alter ego claim on its face is a claim seeking to augment the bankruptcy estate with third-party property interests, it must be adjudicated by an Article III court. Notably, Congress itself did not consider alter ego claims to implicate "core" bankruptcy powers—such claims are not included among the statutory list of "core" matters specified in § 157(b). The same result is required as a constitutional matter under the principles enunciated in *Stern*, and under the historical bankruptcy practices that inform those principles.

1. *The Alter Ego Claim Is A Common Law Claim Seeking To Augment The Estate With Third-Party Assets*

The Court in *Stern* held that a debtor's tort claim against a third party could not be finally adjudicated by the bankruptcy court because it did not seek "a pro rata share of the bankruptcy res," 131 S. Ct. at 2618, but instead was a claim "at common law that simply attempt[ed] to augment the bankruptcy estate" with the defendant's assets, *id.* at 2616. For that critical distinction, *Stern* relied on *Northern Pipeline*, which held that the debtor's state-law contract claim against a third party could not be finally adjudicated by the bankruptcy court, and *Granfinanciera*, which held that a trustee's fraudulent conveyance action under § 548(a)(2) to recover assets from a third party could not be withdrawn from Arti-

cle III adjudication where jury trial rights apply. *See supra* at 19-20. As *Stern* emphasizes, all three claims shared the same features: each was essentially a common law claim that sought to augment the bankruptcy estate with property owned by third parties, and none was intertwined with the "core bankruptcy power" of "restructuring ... debtor-creditor relations." *Arkison*, 134 S. Ct. at 2170-71 (quotation omitted); *see Stern*, 131 S. Ct. at 2614-16, 2418.

The same is true of the "alter ego" claim asserted by Wellness: it is a common law claim that seeks to augment the estate with third-party property, and nothing about the claim is intertwined with the restructuring of debtor-creditor relations and allocation of the bankruptcy res. As shown in Section I.A above, Sharif possessed no property interest in the Trust assets—only Wattar and Ragda did. Those distinct, third-party property interests did not automatically become part of the bankruptcy estate by operation of the Code. Just the opposite: they were specifically excluded by §§ 541(b)(1) and 541(d). *See supra* at 24. Accordingly, Wellness's alter ego claim *necessarily* sought to augment the bankruptcy estate by adding the property of third parties.

Wellness's claim also does not arise uniquely from "the bankruptcy itself," nor must it "necessarily be resolved in the claims allowance process." *Stern*, 131 S. Ct. at 2618. It is a theory of recovery familiar in common law contract and debt actions, *see, e.g.*, *Gallagher v. Reconco Builders, Inc.*, 415 N.E.2d 560, 563-64 (Ill. App. Ct. 1980), and whether the Trust assets are added to the estate has nothing to do with whether Wellness's claims are allowed or Sharif's debts are discharged. *See infra* at 35-37. Section

541, the provision now cited by Wellness, does not include a private right of action for veil-piercing (or anything else), and there is no "federal common law of property rights." *Bishop*, 426 U.S. at 349 n.14; *see infra* at 33-34.[5] Property interests instead "are created and defined by state law." *Stern*, 131 S. Ct. at 2616 (quotation omitted). Count V of Wellness's complaint tacitly acknowledges as much—contrary to Wellness's position here, Count V does not cite § 541, but instead tracks almost word-for-word the elements of a common law alter ego claim under Illinois law.

Under Illinois law, one legally distinct entity may be deemed the alter ego of another if the party seeking to pierce the veil proves both "that (1) there is such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and (2) circumstances are such that adhering to the fiction of a separate corporate existence would promote injustice or inequity." *Int'l Fin. Servs. Corp. v. Chromas Techs. Can. Inc.*, 356 F.3d 731, 736 (7th Cir. 2004) (quotation omitted). Count V of Wellness's complaint accordingly alleges that there was such a "unity" between Sharif and the Trust that their separateness no longer existed, and that excluding the Trust's assets from the estate would "result in injustice." J.A. 20. Because that private common-law claim exists entirely inde-

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[5] Even if the Code did create an express "alter ego" claim, it could not be finally adjudicated by the bankruptcy court. *See infra* at 35-36.

pendent of the bankruptcy, it must be adjudicated by an Article III court.[6]

2. *Bankruptcy Courts Historically Were Prohibited From Seizing Third-Party Assets*

The "firmly established historical practice" under English and American bankruptcy laws, *Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring), prohibited bankruptcy courts from seizing property owned and possessed by legally distinct third-party entities, contrary to Wellness's suggestion. Petr. Br. 32; *see also* ACB Br. 15-16. Bankruptcy courts surely did have summary jurisdiction "to decide whether *a debtor's property* constitutes property of the bankruptcy estate." Petr. Br. 32 (emphasis added). But they *never* had summary jurisdiction to resolve bona fide ownership claims of *third parties* to property in their possession. Every authority and precedent cited by Wellness makes that point clear.

a. Wellness emphasizes that English bankruptcy commissioners had the right to administer property "rightfully in the possession of the estate" in summary equitable proceedings (precursors to today's bankruptcy court proceedings). *Id.* at 34 (quot-

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[6] Wellness's own amicus the American College of Bankruptcy ("ACB") concedes that an alter ego claim "based on the injustice to the creditor of maintaining the separateness of the third party's assets from the debtor's assets"—which is exactly what Wellness asserts—is a claim that "may well ... require[] adjudication by an Article III court." ACB Br. 18-19. There is no reason to equivocate, as the College's own explanation shows: "Such a claim would resemble a fraudulent-transfer suit against a non-creditor: It would arise under the common law between private parties and would seek to augment the bankruptcy estate rather than to identify and marshal the existing assets in the estate." *Id.* at 19. Quite so.

ing Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After* Stern v. Marshall, 86 Am. Bankr. L. J. 121, 124 (2012)). But as explained in the same article cited by Wellness, bankruptcy commissioners could exercise authority *only* over "property that actually found its way into the hands of the commissioners and the estate's representative, the assignee in bankruptcy." Brubaker, 86 Am. Bankr. L. J. at 123. Critically, "if a determination were required to ascertain *whether property belonged in the bankrupt's estate or not*"—the type of claim at issue here—"there was no 'bankruptcy' jurisdiction, as such, over the matter." *Id.* (emphasis added). The only way a trustee could obtain "money or property from a third party" on the ground that the property should be part of the estate was to file "an ordinary formal suit in the appropriate superior court." *Id.* at 123-24. In the words of Lancelot Shadwell, the Vice-Chancellor of England, "[t]he jurisdiction in bankruptcy has authority to deal only with that which is the bankrupt's estate; but has no power to determine what *is* the bankrupt's estate." *Id.* at 123 (quoting *Halford v. Gillow*, 60 Eng. Rep. 18, 20 (Ch. 1842)).

English bankruptcy commissioners, in other words, may have been able to "break open the homes, warehouses, trunks, or chests *of the bankrupt* to seize property belonging to the bankruptcy estate." Pet. Br. 33-34 (emphasis added). But they could *not* accost *a third party* and demand surrender of property to the estate. Plenary proceedings were required to resolve third-party disputes over property ownership.

b. Practice in the United States followed a similar model. Under the 1898 Act, the bankruptcy es-

tate was confined to property in the debtor's "actual or constructive" possession at the time of the bankruptcy. *N. Pipeline*, 458 U.S. at 53; *see Katchen v. Landy*, 382 U.S. 323, 327 (1966); *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481 (1940). Possession was "essential to jurisdiction," *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426, 432 (1924), and thus "where possession [was] assertedly held not for the bankrupt, but for others prior to bankruptcy," the party in possession was "not subject to summary jurisdiction"—it could be divested of its property interest only through "a plenary suit under § 23 of the Bankruptcy Act." *Phelps v. United States*, 421 U.S. 330, 335-36 (1975) (quotation omitted); *see May v. Henderson*, 268 U.S. 111, 115 (1925) ("It is well settled that property or money held adversely to the bankrupt can only be recovered in a plenary suit and not by a summary proceeding in a bankruptcy court.").[7]

To determine its own jurisdiction, the bankruptcy court did have narrow authority to "ascertain[]" whether the third party's ownership claim was "ingenuous and substantial"—if so, the bankruptcy court could not proceed unless the third party consented to the adjudication of its rights. *Cline*, 323 U.S. at 98. But so long as the property was possessed by a third party with a "bona fide claim adverse to the receiver or trustee in bankruptcy," the rights to the property had to be "adjudicated 'in suits

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[7] The possession required for summary jurisdiction included "[c]onstructive possession," which referred to property owned by the debtor but "in the hands of the bankrupt's agent or bailee," or of "some other person" who either makes "no claim to it" or a claim that is "colorable only." *Taubel-Scott-Kitzmiller*, 264 U.S. at 432-33.

of the ordinary character, with the rights and remedies incident thereto.'" *Id.* at 98-99 (quotation omitted); *see* Kenneth N. Klee, Bankruptcy & the Supreme Court 211-12 (2008) (bankruptcy court "lack[ed] jurisdiction to decide controversies" regarding property in possession of "third person [with] a bona fide claim adverse to the bankruptcy estate"). In short, "in no case where it lacked possession, could the bankruptcy court ... adjudicate in a summary proceeding the validity of a substantial adverse claim," absent the consent of the third-party claimant. *Taubel-Scott-Kitzmiller*, 264 U.S. at 433-34.[8]

That rule was also applied in *Mueller v. Nugent*, 184 U.S. 1 (1902), on which Wellness heavily but mistakenly relies. Petr. Br. 23-24; *see* ACB Br. 16. The Court in *Mueller* held that summary jurisdiction encompassed "the *property of a bankrupt*" that had "come into the hands of a third party before the filing of the petition in bankruptcy, *as the agent of the*

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[8] The practice under the 1898 Act of allowing bankruptcy referees to determine whether a third-party ownership claim is "bona fide" is an irrelevant anachronism. It resulted in "an excessive amount of preliminary litigation over jurisdictional issues" in which a bankruptcy court conducted a "minitrial" on the merits, attempting to apply the "murky contours" of whether the adverse ownership claim was bona fide. Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 Wm. & Mary L. Rev. 743, 792-93 (2000). The practice was arguably consistent with courts' former practice of deciding easy jurisdictional questions to avoid difficult merits inquiries—a practice this Court no longer allows. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). In any event, the third parties here plainly have bona fide ownership claims, which the bankruptcy court did not even consider when it extinguished their property interests through a default judgment against Sharif. *See supra* at 7-9.

bankrupt, and to which [the agent] asserts no adverse claim." 184 U.S. at 14 (emphasis added); *see id.* at 17 (third party "held this money as the agent of ... the bankrupt, and without any claim of adverse interest in himself"). The property, in other words, indisputably belonged to the debtor, and because it was possessed by the debtor's agent for the debtor's benefit, the Court deemed it to be in the "constructive possession" of the debtor himself. *Id.*; *see supra* note 7. Under those circumstances, the bankruptcy court had authority "to compel the bankrupt or his agent to deliver up money or assets of the bankrupt," *id.*—a precursor to the "turnover" action now codified in § 542. But the *Mueller* Court also emphasized that the bankruptcy court could *not* itself have compelled a turnover if the third party had "asserted ... the right to possession by reason of a claim adverse to the bankrupt" that was "real" and not "merely colorable." *Id.* at 15.[9] In that situation, the Court held, the bankruptcy court "must decline to finally adjudicate on the merits." *Id.*

Mueller thus reflects the broader historical record, which squarely refutes, rather than supports, any suggestion that the bankruptcy courts' former "summary jurisdiction" encompassed bona fide property interests possessed by third parties.

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[9] The term "colorable" here was used not its generally positive modern sense, but to mean a claim that was at most only facially plausible but would not withstand even preliminary scrutiny. Brubaker, 41 Wm. & Mary L. Rev at 792-93; *see* Webster's New International Dictionary of the English Language 529 (2d ed. 1955) ("colorable" definition includes "counterfeit or feigned").

3. *The Solicitor General's "Federal Rule Of Decision" Argument Is Incorrect And Irrelevant*

The Solicitor General argues that *Stern* is inapplicable because Wellness's alter ego claim was governed by a "federal rule of decision." U.S. Br. 21 (quotation omitted). That argument is wrong in two respects.

First, there is no such thing as a federal common law alter ego rule. Even Wellness concedes that state law determines the underlying property rights in Trust assets. Petr. Br. 27. The Solicitor General's contrary argument relies entirely on *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1941)—which Wellness never cites—but *Sampsell* does not apply any such federal common law rule. *Sampsell* instead applies the irrelevant and anachronistic "bona fide/merely colorable adverse claim" rule just discussed, holding that a corporation created by the debtor to conceal his assets had no bona fide ownership claim *under state law* because it was a blatant sham, established for no purpose other than to facilitate a fraudulent transfer of the debtor's property to escape his creditors. 313 U.S. at 218-19.

The debtor in *Sampsell* formed the corporation *after* he incurred the debt at issue, installed his wife and son as owners and officers, transferred his business assets to the corporation, and then promptly declared bankruptcy. *Id.* at 215-16. On those facts, the bankruptcy referee determined that "the transfer to the corporation was not in good faith" and that "the corporation was 'nothing but a sham and a cloak'" designed to allow the debtor to shield his assets. *Id.* at 216-17. The referee therefore concluded that "the property of the corporation was property of

the bankrupt estate." *Id.* at 217. This Court upheld the ruling as within the bankruptcy court's summary jurisdiction, but only because on the undisputed facts as they came before the Court, the debtor's corporation did not have "the status of a substantial adverse claimant within the rule of *Taubel-Scott-Kitzmiller*." *Id.* at 218. Rather, the corporation's distinct ownership claim was "merely colorable," because the corporation was "formed in order to continue the bankrupt's business, ... the bankrupt remain[ed] in control, and ... the effect of the transfer [wa]s to hinder, delay, or defraud his creditors." *Id.*

Nothing in that analysis refers to a federal common law alter ego rule. To the contrary, the court of appeals' decision held that "in determining the relationship of the corporation and the bankrupt to each other and the effect thereof, the applicable law is that of California." *Imperial Paper Corp. v. Sampsell*, 114 F.2d 49, 52 (9th Cir. 1940). This Court did not disagree, but instead simply held that the corporation's adverse ownership claim was plainly insubstantial *as a matter of fact*. And under the *Taubel-Scott-Kitzmiller* rule the *Sampsell* Court actually did apply, the bankruptcy court would have *lacked* jurisdiction had there been a bona fide claim of separateness, as there is here. *See supra* at 8-10.[10] *Sampsell*, in short, is as unhelpful to Wellness

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[10] *Sampsell*'s lack of force as precedent on the constitutional limits of bankruptcy court jurisdiction is further confirmed by the fact that the referee's final judgment ruled that the debtor had effectuated a fraudulent transfer to his sham corporation—a ruling plainly beyond the constitutional limits of bankruptcy court jurisdiction defined in *Stern*, 131 S. Ct. at 2614-15 (discussing fraudulent transfer claim in *Granfinaciera*).

as its absence from Wellness's brief suggests.[11]

Second, it is ultimately irrelevant to the *Stern* analysis whether the alter ego claim arises from state law, federal common law, or even federal statutory law. The relevant inquiry is whether it is akin to a *common law claim seeking to augment the estate*, rather than a specialized claim implicating particular expertise concerning the "core ... bankruptcy power" of "restructuring ... debtor-creditor relations." *N. Pipeline*, 458 U.S. at 71; *see Stern*, 131 S. Ct. at 2614-15. This point is clear from *Stern*'s reliance on *Granfinanciera*, which addressed an action by a bankruptcy trustee to "recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2)." 492 U.S. at 53. Even though Congress explicitly created a federal statutory vehicle for trustees to bring such actions in the execution of their Code-created duties, this Court focused on the *substance* of the actions, observing that they "more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Id.* at 56. For that reason, Congress could not "assign [the] adjudication [of a trustee's § 548(a)(2) fraudulent conveyance action] to a specialized non-Article III court lacking the essential attributes of the judicial power." *Id.* (quotation omitted). The same analysis would apply here if—contrary to reality—federal common law governed the alter ego claim.

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[11] The government's other "federal common law" cases do not address the law governing property rights in bankruptcy cases, which clearly is controlled by state law.

4. ***The Bankruptcy Court's Authority To Adjudicate Discharge Objections Does Not Create Authority To Adjudicate Alter Ego Claims***

The Solicitor General also argues that the bankruptcy court could finally adjudicate Wellness's Count V alter ego claim because it depends on the same factual allegations as Wellness's discharge objections in Counts I-IV, which indisputably implicate "core" bankruptcy powers. U.S. Br. 16-17. That argument is incorrect.

The discharge claims are within the bankruptcy court's jurisdiction because they seek to deny Sharif the discharge of his debts to Wellness—a quintessential exercise of the core bankruptcy power to restructure debtor-creditor relations. *See Stern*, 131 S. Ct. at 2605. The alter ego claim is qualitatively different: a ruling in Wellness's favor on the alter ego claim would forever extinguish the Trust's and Ragda's distinct property interests in the Trust assets. In other words, only Count V requires adjudication of third-party property interests, which is why only Count V exceeds the constitutional limits of the bankruptcy court's final adjudication authority.

The same was not true in *Katchen* and *Langenkamp v. Culp*, 498 U.S. 42 (1990), both cited by the Solicitor General. U.S. Br. 16-17. As elaborated at length in *Stern*, both *Katchen* and *Langenkamp* addressed the adjudication of preference claims asserted against creditors *who filed proofs of claim* in the bankruptcy proceeding. *Stern*, 131 S. Ct. at 2616-17. Adjudication of the preference claims was *required* in the process of allowing or disallowing the creditors' claims in those cases, and in that respect was "integral to the restructuring of the

debtor-creditor relationship." *Id.* at 2617 (quotation omitted). "[I]n contrast," where "the creditor has *not* filed a proof of claim, the trustee's preference action does *not* become[] part of the claims-allowance process subject to resolution by the bankruptcy court." *Id.* (first emphasis added; quotation omitted). The third-party interests at stake here track the latter description: neither the Trust nor Ragda filed proofs of claim, and adjudication of their property interests is not in any way required for the allowance and disallowance of those claims that were filed. It is required only because Wellness wants to swell the bankruptcy estate with property in which the Trust and Ragda possess equitable interests. That claim, and the private third-party rights it implicates, must be finally adjudicated by an Article III court.

C. Requiring District Courts To Enter Final Judgment On Alter Ego Claims Would Not Threaten The Efficient Administration Of Bankruptcy Cases

Finally, Wellness warns that the rule Sharif proposes would "threaten[] the efficient administration of bankruptcy cases." Petr. Br. 40. Of course, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Stern*, 131 S. Ct. at 2619 (quotation omitted). But Wellness's concern is misplaced in any event.

Wellness's argument rests entirely on the erroneous premise that under Sharif's position, bankruptcy courts would be categorically prohibited from deciding all state-law issues, even when they are "incidental." Petr. Br. 40-41. Sharif urges no such rule.

He seeks only what *Stern* already requires: Article III adjudication of *common law claims that seek to augment the estate with third-party property*. Accordingly, a ruling in Sharif's favor would not "meaningfully change[] the division of labor in the current statute," *Stern*, 131 S. Ct. at 2620—especially given that bankruptcy courts historically could not even *consider* claims like Wellness's. *See supra* at 28-32.[12]

What is more, after *Arkison*, bankruptcy courts can hear even constitutionally "non-core" matters like alter ego claims and issue "proposed findings of fact and conclusions of law to the District Court to be reviewed de novo." 134 S. Ct. at 2174. In light of that ruling, a bankruptcy court should be able to address all matters before it in a single final opinion to be reviewed by the district court, with the standard of review dependent on the issue being reviewed. There is thus nothing impractical about adhering to *Stern*—and if there were, it would not matter.

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[12] It is worth noting that the Bankruptcy Code already "contemplates that certain state law matters in bankruptcy cases will be resolved by judges other than those of the bankruptcy courts." *Stern*, 131 S. Ct. at 2619. Bankruptcy courts are statutorily prohibited from hearing certain categories of cases, such as personal injury tort and wrongful death claims. 28 U.S.C. § 157(b)(5). The courts have devised methods to expeditiously decide cases involving such claims. *See, e.g.*, *In re ASARCO LLC*, 2009 WL 8176865, at *1 (Bankr. S.D. Tex. July 21, 2009) (partial withdrawal of reference "efficiently resolve[d]" outstanding issues); *In re Ephedra Prods. Liability Litig.*, 2005 WL 1593046, at *1 (S.D.N.Y. June 3, 2005) (district court ordered that it and bankruptcy court would "jointly hear" further issues).

II. SHARIF COULD NOT AND DID NOT CONSENT TO FINAL ADJUDICATION OF WELLNESS'S ALTER EGO CLAIM BY THE BANKRUPTCY COURT

Wellness contends that even if the bankruptcy court's entry of final judgment on Sharif's alter ego claim violated Article III, the violation does not matter because Sharif consented to final adjudication by the bankruptcy court. But Sharif could not and did not provide such consent. The limitation on bankruptcy courts' jurisdiction implicates structural separation-of-powers interests, not just the waivable personal rights of bankruptcy litigants. An Article I court's exercise of power constitutionally reserved to Article III courts is thus an error "the parties cannot by consent cure." *Schor*, 478 U.S. at 851. That principle applies with particular force where, as here, a third party whose property interests the bankruptcy court purports to adjudicate specifically *objected* to the bankruptcy court's authority. And even if Sharif could consent, he did not in fact, because he never *expressly* agreed to the exercise of final adjudicatory power by the bankruptcy court over the "non-core" alter ego claim, as required by Bankruptcy Rule of Procedure 7012. Nor did he otherwise knowingly and voluntarily consent to non-Article III adjudication.

A. Sharif Could Not Consent To The Exercise Of Article III Power By An Article I Bankruptcy Court

1. *Private Parties May Not Alter The Separation Of Powers Mandated By The Constitution*

a. "Basic to the constitutional structure established by the Framers was their recognition that

'[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'" *N. Pipeline*, 458 U.S. at 57 (plurality opinion) (quoting The Federalist No. 47, at 300 (J. Madison) (H. Lodge ed. 1888)). The Constitution's Framers defended against such tyranny by assuring "that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct." *Id.* "The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature." *Id.* at 58.

Judicial independence was assured not only by the vesting of the judicial power exclusively in the federal courts, but also through the structural provisions provided for in Article III, § 1—federal judges are guaranteed life tenure (subject only to removal by impeachment) and "a fixed and irreducible compensation for their services." *Id.* at 59. Article III is thus "an inseparable element of the constitutional system of checks and balances that both defines the power and protects the independence of the Judicial Branch." *Stern*, 131 S. Ct. at 2608 (citation and internal quotation marks omitted). And this Court has repeatedly held that one of the ways Article III protects that "system of checks and balances" is by assuring that the Judiciary's authority to decide private claims cannot be transferred to non-Article III tribunals subject to congressional and executive control (and hence possible manipulation). *See Stern*, 131 S. Ct. at 2609.

b. It is fundamental that a private litigant may not, through his litigation conduct, adjust the constitutional relationship between the three governmental branches. Article III "not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as 'an inseparable element of the constitutional system of checks and balances.'" *Schor*, 478 U.S. at 851 (quoting *N. Pipeline*, 458 U.S. at 58). And when "this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2." *Id.* at 850-51. "When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." *Id.* at 851.

2. Stern *And* Schor *Make Clear That The Debtor's Consent Alone Does Not Justify A Bankruptcy Court's Exercise Of Power Reserved To Article III Courts*

The constitutional violation in this case is the same violation at issue in *Stern*—a final bankruptcy court adjudication of a private-rights claim. That violation cannot be cured by party consent because it poses a direct "threat to the separation of powers." *Stern*, 131 S. Ct. at 2620.

a. *Stern*'s analysis of *why* bankruptcy courts may not finally adjudicate "private rights" rests entirely on separation-of-powers concerns. "Under the basic concept of separation of powers ... that flow[s]

from the scheme of a tripartite government adopted in the Constitution," *Stern* explains, "the judicial Power of the United States" cannot be shared with the other branches. *Id.* at 2608 (quotation omitted). "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking," the Court emphasized, "if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III." *Id.* at 2609. For these *structural* reasons, "Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'" *Id.* (quoting *Murray's Lessee*, 59 U.S. at 284).

Indeed, *Stern* asked and answered the very question at issue here. The question: "Is there really a threat to the separation of powers where Congress has conferred the judicial power outside Article III only over certain counterclaims in bankruptcy?" *Id.* at 2620. The "short but emphatic" answer: "yes." *Id.* And because Wellness's alter-ego claim is in all material respects identical to the tort claim at issue in *Stern*, *see supra* at 25-27, allowing a bankruptcy court to enter a final judgment—even with litigant consent—would "compromise the integrity of the system of separated powers and the role of the Judiciary in that system." 131 S. Ct. at 2620.

b. This Court's decision in *Schor*, as analyzed in *Stern*, further confirms that the Article III violation at issue here cannot be cured by litigant consent. *Schor* "concerned a statutory scheme that created a procedure for customers injured by a broker's violation of the federal commodities law to seek reparations from the broker before the Commodity Futures

Trading Commission (CFTC)." *Stern*, 131 S. Ct. at 2613; *see Schor*, 478 U.S. at 836. A customer filed a claim with the CFTC "to recover a debit balance in his account"; the broker initially sued for the same amount in federal court but then submitted its claim to the CFTC. *Stern*, 131 S. Ct. at 2613 (citing *Schor*, 478 U.S. at 837-38). After the agency ruled against the customer, "the customer argued that agency jurisdiction over the broker's counterclaim violated Article III." *Id.*

This Court rejected that argument, holding that any right the customer had to an Article III tribunal was waivable (and waived), because his claim at most implicated only his personal right to an Article III adjudication, and not the structural interests protected by Article III. 478 U.S. at 857-58. But the factors underlying the Court's decision in *Schor* compel the opposite conclusion here, as *Stern* itself explains:

- In *Schor*, "CFTC orders were 'enforceable only by order of the district court.'" *Stern*, 131 S. Ct. at 2613 (quoting *Schor*, 478 U.S. at 853). Here, Congress authorized bankruptcy courts to enter final judgments of the United States, with only appellate review by district courts. 28 U.S.C. §§ 157(b)(1), 158(a)(1).

- In *Schor*, "the claim and the counterclaim concerned a 'single dispute'—the same account balance." *Stern*, 131 S. Ct. at 2613 (quoting *Schor*, 478 U.S. at 844). The alter ego claim here, by contrast, is materially distinct from the discharge claims and im-

plicates rights and interests far beyond those claims. *See supra* at 35-37.

- The claim at issue in *Schor* was "'completely dependent upon'" and "created by federal law." *Stern*, 131 S. Ct. at 2614 (quoting *Schor*, 478 U.S. at 856). The alter ego claim here turns on state law. *See supra* at 27, 33.
- "[T]he CFTC's assertion of authority involved only 'a narrow class of common law claims' in a 'particularized area of law.'" *Stern*, 131 S. Ct. at 2613 (quoting *Schor*, 478 U.S. at 852, 854). This case "deal[s] ... not with an agency but with a court, with substantive jurisdiction reaching any area of the *corpus juris*." *Id.* at 2615.
- In *Schor*, "the area of law in question was governed by 'a specific and limited federal regulatory scheme' as to which the agency had 'obvious expertise.'" *Id.* at 2613 (quoting *Schor*, 478 U.S. at 855). By contrast, "[t]he 'experts' in the federal system at resolving common law counterclaims"—as with common law alter ego claims—"are the Article III courts." *Id.* at 2615.
- In *Schor*, "the customer's reparations claim before the agency and the broker's counterclaim were competing claims to the same amount," and thus "the Court repeatedly emphasized that it was 'necessary' to allow the agency to exercise jurisdiction over the broker's claim, or else 'the reparations procedure would have been confounded.'" *Id.* at 2613-14 (quoting *Schor*, 478 U.S. at 856). But here, as in *Stern*, the federal bankrupt-

cy-law discharge objections could be resolved without resolving the state-law alter ego claim, and vice versa. *Supra* at 35-37.

- Finally, the parties in *Schor* "had freely elected to resolve their differences before the CFTC." *Stern*, 131 S. Ct. at 2613; *see Schor*, 478 U.S. at 855.

Wellness understandably emphasizes only the final factor—party consent. But the fact that consent was only *one* of many factors relevant to whether Article III adjudication was required demonstrates beyond any doubt that consent is "not dispositive," as Wellness ultimately concedes. Petr. Br. 58. And in any event, Sharif did not "freely elect" bankruptcy court adjudication. *See infra* at 53-55.

Schor accordingly reflects the principle *Stern* later underscored—allowing bankruptcy courts to adjudicate private rights implicates structural separation-of-powers concerns that "the parties cannot by consent cure." *Schor*, 478 U.S. at 851.

3. *Wellness's Contrary Arguments Lack Merit*

a. Wellness principally contends that the structural interests discussed in *Stern* are irrelevant here because the parties in *Stern* had not consented to final adjudication by the bankruptcy court. Petr. Br. 44-45. But the lack of consent in *Stern* simply means that the issue presented here was absent there. Nothing in *Stern* suggests that litigant consent *could* cure the structural separation-of-powers violation it recognized.

To the contrary, *Stern* holds that if "the bankruptcy court itself exercises 'the essential attributes of judicial power [that] are reserved to Article III

courts,' ... *it does not matter who ... authorized the judge to render final judgments* in such proceedings." 131 S. Ct. at 2619 (quoting *Schor*, 478 U.S. at 851) (emphasis added). That passage explains why it is irrelevant that Article III judges appoint bankruptcy judges; it follows that if Article III courts cannot authorize bankruptcy courts to exercise Article III powers, then surely private parties cannot do so either.

b. Wellness next contends that "the right to an Article III court is eminently waivable" because Article III "'primarily' protects the individual." Petr. Br. 48 (quoting *Schor*, 478 U.S. at 848). But *Stern* rejects this dichotomy between individual and structural Article III interests, at least for the types of Article III violations at issue here: "'The structural principles secured by the separation of powers'" protect "'each branch of government from incursion by the others'" *and* "'protect the individual as well.'" 131 S. Ct. at 2609 (quoting *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011)). Put differently, Article III protects individual liberty by enforcing the constitutional restrictions on each Branch's power—including the prohibition on the exercise of the Article III judicial power by entities subject to congressional and executive control.

c. Wellness also argues that Article III errors implicate the separation of powers only when Congress attempts to "'*transfer jurisdiction*'" from Article III courts to non-Article III tribunals. Petr. Br. 49 (quoting *Schor*, 478 U.S. at 850). But that is exactly what happened here—on Wellness's theory of the statute, Congress authorized bankruptcy courts to render final, binding judgments of the United States

on a private-rights claim, granting district courts only appellate jurisdiction over such claims.

Wellness says there was no transfer of jurisdiction here because "bankruptcy judges operate entirely within the confines of the Judicial Branch and under the direct control of the district courts." Petr. Br. 49; *see* U.S. Br. 27-28. *Stern* holds otherwise: "[I]t is ... the bankruptcy court itself that exercises the essential attributes of judicial power." 131 S. Ct. at 2618. Because the bankruptcy court "has the power to enter appropriate orders and judgments—including final judgments—subject to review only if a party chooses to appeal," the "authority—and the responsibility—to make an informed, final determination ... remains with the bankruptcy judge, not the district court." *Id.* at 2619 (quotation omitted). The supervisory powers of the federal district courts thus do not eliminate the "threat to the separation of powers" created by conferring on bankruptcy courts authority to decide cases reserved by the Constitution to Article III courts. *Id.* at 2620.

d. Wellness next asserts that this Court has consistently allowed non-Article III tribunals "operating under the control of Article III courts to enter judgments with litigant consent." Petr. Br. 52. But this Court has never held that litigant consent can remedy a non-Article III tribunal's *final adjudication* of a claim that the Constitution reserves for an Article III court. In every case Wellness cites, the "essential attributes of judicial power" remained with an Article III court. *Schor*, 478 U.S. at 852. Most do not even involve the entry of a final judgment by a non-Article III tribunal. *See Peretz v. United States*, 501 U.S. 923, 937 (1991) (magistrate judge may preside over *voir dire* with the defendant's consent be-

cause district court controls the process and enters judgment); *Schor*, 478 U.S. at 853 (CFTC orders were "enforceable only by order of the district court"); *Kimberly v. Arms*, 129 U.S. 512, 524-25, 530 (1889) (trial court entered final judgment giving effect to parties' agreement, akin to an arbitration agreement, to allow special master to make factual findings); *Newcomb v. Wood*, 97 U.S. 581, 583 (1878) (court confirmed referees' report and entered judgment); *Heckers v. Fowler*, 69 U.S. (2 Wall.) 123, 126-27, 133 (1864) ("judgment was rendered" by the trial court "upon the report of the referee," to which "the losing party made no objections").

Wellness cites only two cases in which the Court considered the effect of litigant consent on the entry of final judgment by non-Article III tribunals, but both were decided on *statutory* grounds. In *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263 (1932), the Court held that bankruptcy referees were "courts" within the meaning of § 23b of the Bankruptcy Act, and did not mention the Constitution. *Id.* at 268; *see* Pet. App. 44a n.2 (discussing *McDonald*). Similarly, in *Roell v. Withrow*, 538 U.S. 580 (2003), "[t]he *only* question" was the *statutory* question "whether [implied consent] can count as conferring 'civil jurisdiction' under [28 U.S.C.] § 636(c)(1)"—a provision of the Federal Magistrates Act—"or whether adherence to the letter of § 636(c)(2) is an absolute demand." *Id.* at 586-87 (emphasis added); *see id.* at 587 n.5. In holding that implied consent can satisfy § 636(c)(1), the Court did not address the "serious constitutional concerns" raised by the dissent concerning entry of judgment by a magistrate. *Id.* at 592 (Thomas, J., dissenting).

e. Finally, the Solicitor General contends that arbitration, in which parties do consent to an arbitral determination of their rights, "provides [a] useful analogue" for the entry of final judgment by a bankruptcy court. U.S. Br. 25-26. Not so. "[A]rbitration is not a judicial proceeding," *McDonald v. City of W. Branch*, 466 U.S. 284, 288 (1984) (quotation omitted), and arbitrators do not exercise the core authority of Article III courts—entering final *judicial* determinations on matters of private right. A judgment confirming an arbitral order must be entered by a court. *See* 9 U.S.C. § 9.

Indeed, the difference between private arbitration and the alter ego claim at issue here demonstrates why litigant consent is particularly irrelevant in ameliorating the constitutional error identified in Part I. Arbitration does not involve the final adjudication of legal and equitable rights of third parties not subject to the arbitration. An alter ego claim does, which is why it cannot be finally adjudicated by a bankruptcy court. Even if the *litigant* consented to bankruptcy court adjudication of third-party property rights, that does not mean the *third parties* did. In this case, Ragda never consented to the bankruptcy court's adjudication of her rights in the Trust assets; to the contrary, she moved to withdraw the bankruptcy court's mandate for lack of authority to adjudicate her rights. *See supra* at 13 & n.4. No separation-of-powers principle would allow a litigant to consent to the Article III adjudication of a non-party's private rights.

B. Even If Litigant Consent Could Cure The Unlawful Exercise Of Article III Power By The Bankruptcy Court, Only *Express* Consent Would Suffice, And Sharif Did Not Provide It

Even if it were true that litigant consent could suffice to justify the exercise of Article III power by an Article I entity, such consent must be *express* in the bankruptcy context. Sharif neither provided express consent nor knowingly and voluntarily consented to bankruptcy court adjudication in any other manner.

1. *Bankruptcy Rule 7012(b) Requires Express Litigant Consent To The Bankruptcy Court's Final Adjudication Of "Non-Core" Claims*

Waiver is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Accordingly, a litigant's waiver of the right to adjudication by an Article III court, no less than waiver of any other right, must be knowing and voluntary.

This Court's cases deeming consent relevant to non-Article III court adjudication confirm that point. The Court in *Schor*, for example, made clear that "Schor effectively agreed to an adjudication by the CFTC" based on "full knowledge" that the CFTC would exercise jurisdiction over a counterclaim against him. 478 U.S. at 850. Likewise, in *Roell* the Court repeatedly emphasized that litigation before a magistrate judge imbued with judicial power is permissible under the controlling statute only if, *inter alia*, the litigant is *explicitly advised* of both the "need to consent and the right to refuse it." 538 U.S. at 590; *see id.* at 588 n.5. If a knowing and voluntary

waiver is required even in the *statutory* context, it is certainly required to waive a *constitutional* right to an Article III court. And in the bankruptcy context in particular, only *express* consent suffices.

"*Stern* claims" of the sort at issue here are claims that Congress *statutorily* designated as "core" in § 157(b)(2)—and thus subjected to bankruptcy court adjudication absent consent under § 157(b)(1)—but that *constitutionally* must be decided by an Article III court. Such claims are analogous to "non-core" claims covered by § 157(c)—claims that cannot be finally adjudicated by a bankruptcy court absent consent of the parties. *See Arkison*, 134 S. Ct. at 2173. In Wellness's words, "a '*Stern* claim' and a non-core claim [under § 157(c)] are the same." Petr. Br. 46.

But if so, then the debtor's consent to final bankruptcy adjudication must be *express*, as Bankruptcy Rule 7012(b) specifically requires for the adjudication of non-core matters: "In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties." Fed. R. Bankr. P. 7012(b). That rule—which, like all Bankruptcy Rules, is mandatory and carries the force of statute, *see Kontrick* v. *Ryan*, 540 U.S. 443 (2004); ACB Br. 29—reflects this Court's and Congress's judgment that only express consent will assure that waiver of a right to an Article III court is knowing and voluntary. As the College puts it, "[t]here is no reason for this Court to hold that the rule means anything other than what it says." ACB Br. 21.

Wellness nevertheless contends that express consent is unnecessary—and that implied consent

suffices—relying principally on *Roell*. Petr. Br. 64. But *Roell* emphasizes that "implied consent will be the exception, not the rule." 538 U.S. at 591 n.7. And the facts of *Roell* confirm just how exceptional the circumstances must be before consent will be implied.[13]

The party raising the challenge in *Roell* himself expressly consented to adjudication by the magistrate; it was only after he lost at trial that he argued that the magistrate lacked the authority to enter a final judgment because the *opposing parties* had not expressly consented. 538 U.S. at 582-84. "On at least three different occasions," however, counsel for those parties "was present and stood silent when the Magistrate Judge stated that they had consented to her authority." *Id.* at 584 n.1. The parties thus were explicitly "made aware of the need for consent and the right to refuse it," *id.* at 590, which was a "prerequisite" to adjudication by the magistrate, *id.* at 588 n.5. Moreover, when the issue of those parties' consent was raised *sua sponte* on appeal, they stated their consent expressly in a "formal letter" filed with the court. *Id.* at 583-84. In short, there was no

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[13] Wellness also cites two other cases (Petr. Br. 64), both of which are inapposite. In *Thomas v. Arn*, 474 U.S. 140 (1985), the Court held that waiver of objections to proposed findings of fact and conclusions of law does not "remove[] the essential attributes of the judicial power" from Article III courts because the district judge "retains full authority ... to enter judgment." *Id.* at 154 (quotation omitted). And *Cline* "reject[ed] the suggestion that respondents conferred consent" on a bankruptcy referee "by participating in the hearing on the merits." 323 U.S. at 100. *Cline* also was a statutory case, not an Article III case. *See id.* at 99 (relying for the proposition that a litigant could consent to bankruptcy jurisdiction on *MacDonald*, itself a statutory precedent, *see supra* at 48).

question that all parties in *Roell* actually did consent, knowingly and voluntarily, to entry of judgment by the magistrate. And even then, only a bare majority of Justices found the requirements of express consent satisfied. *See id.* at 592 (Thomas, J., dissenting, joined by Stevens, Scalia, and Kennedy, JJ.) (rejecting conclusion that "consent need not be explicit, but rather may be inferred from the parties' conduct").

2. *Sharif Did Not Provide The Express Consent Required By Rule 7012(b), Or Otherwise Knowingly And Voluntarily Consent To Bankruptcy Court Adjudication*

The circumstances that (barely) justified a finding of consent in *Roell* bear no resemblance to the circumstances of this case. The bankruptcy court here did not repeatedly assert in Sharif's presence that Sharif had consented to its authority to finally decide the alter ego claim, without protest by Sharif, and Sharif did not eventually express his consent in writing after the fact. The facts of consent in *Roell* confirm the absence of consent here.

a. Wellness nevertheless contends that Sharif expressly consented by filing the bankruptcy case itself. Petr. Br. 61. That argument borders on frivolous. The fact that Sharif consented to the bankruptcy court's administration of his estate (plainly within the bankruptcy court's constitutional authority) does not remotely suggest his consent to the bankruptcy court's *adjudication of Wellness's alter ego claim*. On Wellness's theory, every debtor who voluntarily files for bankruptcy *necessarily* satisfies Rule 7012(b)'s express consent requirement as to any non-core proceeding that may arise during the bank-

ruptcy. Wellness's argument would make the Rule meaningless, which is why the argument cannot be correct.

b. Wellness also contends that Sharif consented to bankruptcy court jurisdiction by (i) admitting in his answer that Wellness's adversary complaint (including its alter-ego claim) was a "core" claim within the meaning of § 157(b), and (ii) filing a summary judgment motion on all Wellness's claims (including its alter ego claim) in bankruptcy court. Wellness recognizes that this conduct can only count as *implied* consent, Petr. Br. 65, effectively conceding that it cannot qualify as the express consent required by Rule 7012(b). And in any event, neither of these acts comes anywhere close to expressing Sharif's knowing and voluntary consent to the bankruptcy court's finally adjudicating Wellness's alter ego claim.

Wellness's complaint alleged that its claims were "core" solely under § 157(b)(2)(J), which solely governs discharge objections. That allegation thus necessarily applied only to Counts I-IV, which are the only counts asserting discharge objections. *See supra* at 10-11. Wellness alleged no statutory basis on which the alter ego claim could be deemed core. Sharif's acquiescence to Wellness's statutory assertion of core status under § 157(b)(2)(J) thus likewise could not have applied to Count V, which plainly does not assert any discharge-based claim. Sharif did mistakenly agree in his answer with Wellness's allegation that its entire complaint was core under §157(b)(2)(J), but that mistake is, if anything, the opposite of *knowing and voluntary* consent to bankruptcy court adjudication of the one claim that was *not* core either under § 157(b)(2)(J) or the Constitution. Unlike in *Roell*, Sharif was never given clear

notice that he was free to decline consent to adjudication of the alter ego claim by the bankruptcy court.

Sharif's filing of a summary judgment motion in the bankruptcy court also was not knowing and voluntary consent to entry of final judgment by the bankruptcy court. A summary judgment motion does not itself concede the decisionmaker's authority to enter a *final* judgment on the subject of the motion—it means only that the issue can be resolved as a matter of law. A summary judgment motion easily could be filed in a "non-core" bankruptcy court proceeding—the court would simply make a ruling, which then would be reviewed de novo. Further, Sharif again was never given notice that he could prevent a final adjudication of the alter ego claim simply by withholding his consent. His knowing and voluntary consent to the exercise of Article III power by the bankruptcy court thus cannot be inferred from the mere fact that he litigated Wellness's adversary proceeding in the normal course. That is especially so because neither *Stern* nor *Arkison* had been decided when Wellness's adversary complaint was being litigated, and Sharif could not have anticipated this Court's decisions at the time. Where this Court "decides a relevant case while litigation is pending ... omission of an argument based on [this] Court's reasoning does not amount to a waiver." *Ind. Bell Tel. Co., v. McCarty*, 362 F.3d 378, 390 (7th Cir. 2004) (quotation omitted); *see Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143-45 (1967) (party does not waive a "known right" simply by failing to assert the right before it was recognized in subsequent decision).

C. Sharif Did Not Forfeit His Article III Argument By Failing To Raise It On Appeal

Finally, Sharif did not forfeit his constitutional objection to the bankruptcy court's unlawful exercise of Article III power by failing to assert the objection on appeal. Petr. Br. 65; U.S. Br. 32.

First, entry of final judgment on private rights by a bankruptcy court judge, as in this case, presents a structural Article III problem that "the parties cannot by consent cure." *Schor*, 478 U.S. at 851. And a "right that cannot be waived cannot be forfeited by other means." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 895 n.2 (1991) (Scalia, J., concurring).

Second, and in any event, the Article III violation here cannot be cured by forfeiture because the violation deprived the district court of appellate jurisdiction. The district court only has jurisdiction (as relevant) to hear appeals of bankruptcy court "final judgments." 28 U.S.C. § 158(a). The consequence of the constitutional error in this case is that the bankruptcy court lacked authority to enter a final judgment on Wellness's alter ego claim. And because there was no valid final judgment, the district court lacked appellate jurisdiction to review the judgment—a jurisdictional defect that "can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002); *see Roell*, 538 U.S. at 597-99 (Thomas, J., dissenting) (lack of consent to magistrate adjudication must be corrected *sua sponte* on appeal because magistrate can only enter final judgment with consent, and appellate jurisdiction depends on existence of a final judgment); *Ortiz*, 665 F.3d at 915

(*Stern* error results in invalid bankruptcy court final judgment and thus defeats appellate jurisdiction).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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November 19, 2014

REPLY BRIEF

No. 13-935

IN THE

Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LIMITED, RALPH OATS, AND CATHY OATS,

Petitioners,

v.

RICHARD SHARIF,

Respondent.

On Writ of Certiorari to the United States Court Of Appeals for the Seventh Circuit

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I. Bankruptcy Courts Have Constitutional Authority To Enter Judgment On §541 Claims.

The bankruptcy court possessed constitutional authority to decide whether the disputed assets belonged to the debtor Sharif's bankruptcy estate because those assets were in Sharif's possession and under his control when he filed for bankruptcy. *See* Pet.Br.19-42. Sharif contends otherwise, maintaining that all a debtor need do to eliminate a bankruptcy court's authority to decide the extent of the bankruptcy estate is to claim that assets he possesses and controls actually belong to another. Resp.Br.22-25. Once a debtor makes that claim, Sharif asserts, the court loses all authority to decide whether the debtor in fact holds title to the assets. *Id.* As the Court recognized over a century ago in *Mueller v. Nugent*, Sharif's proposed rule would create significant opportunities for mischief. 184 U.S. 1, 14 (1902). More importantly, it disregards this Court's long-established precedent that the "test" of a bankruptcy court's authority "is *not title in* but *possession by* the bankrupt at the time of the filing of the petition...." *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481 (1940) (emphasis added).

Sharif indisputably had possession and control over the assets. He admitted, and the bankruptcy court ruled, that before Sharif filed for bankruptcy, he claimed the assets as his own on a loan application. Pet.App.7a. But even accepting Sharif's post-bankruptcy assertion that his pre-bankruptcy statements about his ownership of the assets were

dishonest and that he really held the assets in trust, *id.*, as the purported trustee, Sharif had possession of and control over those assets under Illinois law. *See* 760 ILCS §§5/4-5/4.26 (describing trustee's rights over trust property).[1] That possession of and control over the assets are precisely what gave the bankruptcy court the constitutional authority to determine the extent of Sharif's title in those assets. *See Thompson*, 309 U.S. at 481; Pet.Br.22-25. Because Sharif's contrary arguments depend on the Court concluding that bankruptcy courts cannot decide title disputes with a debtor, all fail.

A. Sharif's Reliance On §541(d) Is Misplaced.

Sharif's reliance on 11 U.S.C. §541(d) to support his argument that bankruptcy courts cannot decide title disputes with debtors is misplaced. Resp.Br.22-25. Section 541, including subsection (d), addresses only how the Bankruptcy Code treats an asset (*i.e.*, placing it in or out of the estate) once the debtor's title to that asset is settled. It says nothing about who decides a dispute over the application of §541. Sharif proposes a rule that conflates the authority to decide the dispute with the dispute's outcome. He contends that, if the ultimate answer to the §541(d) dispute is that his trust was valid, then the

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[1] Sharif assumes Illinois law applies. Resp.Br.22. In any event, Illinois law is unremarkable on this point. "The duties of the trustee almost universally require him to take into his possession tangible realty or personalty, and to reduce choses in action to possession." Bogert Trusts & Trustees, §583 (2d rev. ed. 2013).

bankruptcy court would not have had the authority to decide whether the trust was valid in the first place. Resp.Br.15, 22-25.

Sharif's analytical framework is unworkable because it yields different answers to the question whether a §541 claim is a "*Stern* claim" depending on whether the property is ultimately found to be in or out of the estate. It also contradicts the long-standing rule that bankruptcy courts have the power to determine in the first instance if the debtor has actual or constructive possession of property. If the debtor has such possession, and here Sharif's possession was actual, then the bankruptcy court has the authority to decide the debtor's title in the property. *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426, 433 (1924).

Moreover, Sharif misunderstands both trust and bankruptcy law. Sharif acknowledges that as purported trustee he held legal title to the alleged trust assets, but claims that legal title is not a property interest because it is valueless. Resp.Br.23. The case Sharif cites for this proposition, however, *In re Pfister*, expressly recognized that this "valueless" asset of "bare legal title" still "'becomes property of the [bankruptcy] estate.'" 749 F.3d 294, 297 (4th Cir. 2014) (quoting 11 U.S.C. §541(d)). Further, by allowing a trustee to abandon property of "inconsequential value," §554 confirms that §541 does not erect a value barrier to including property in the estate. 11 U.S.C. §554(a). Thus, Sharif's position that his "'bare' legal title" left him with no

property interest the Bankruptcy Code recognizes is incorrect. Resp.Br.23.

Rather than help Sharif, §541(d) actually supports Wellness's position that property-of-the-estate determinations "stem[] from the bankruptcy itself" and may be decided by a bankruptcy court. *Stern v. Marshall*, 131 S. Ct. 2594, 2618 (2011). By establishing through §541(a) and (d) that assets in which a debtor holds only legal title are nonetheless estate property, Congress reinforced the *in rem* nature of bankruptcy court authority over *all* property in the debtor's possession. *See Central Va. Cmty. College v. Katz*, 546 U.S. 356, 363-64 (2006); 28 U.S.C. §1334(e). That *in rem* authority is required to accomplish the very purpose of every bankruptcy: ceding control over one's property in exchange for a fresh start. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). Therefore, such authority is central to "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982).

B. Wellness's §541 Claim Differs Fundamentally From A "*Stern* Claim."

Sharif argues that Wellness's §541 claim is the same as the claim in *Stern* and therefore outside the bankruptcy court's authority to decide. Resp.Br.25-28. In *Stern*, the debtor brought a state-law tort claim against a creditor seeking money damages for an injury that occurred *before* the bankruptcy began;

she brought that claim in bankruptcy court only because she had filed her bankruptcy case there. 131 S. Ct. at 2601-02. Wellness's §541 action does not ask for money damages and is not based on common law; instead, it seeks a declaration based on federal law that property in the debtor's possession belongs to his bankruptcy estate. A §541 claim would have no existence outside of a bankruptcy case because it is the "commencement of a case ... [that] creates an estate." 11 U.S.C. §541(a). Sharif's efforts to mask these fundamental differences fail.

First, Sharif describes Wellness's claim as a state-law alter-ego action, stressing that Wellness's complaint "does not cite §541...." Resp.Br.26-27. But below, even Sharif recognized that Wellness brought its claim under §541. No.12-1349,ECF29at30-31(7th Cir.May30,2012). He was correct: Wellness's complaint alleged that "[t]here is a justiciable controversy between Debtor and [Wellness] as to the Debtor's ownership interest in property purportedly held in the name of the Soad Watter Living Trust" and asked that the disputed property be "*treated as part of Debtor's estate.*" J.A.19(¶35),21(¶38) (emphasis added). Wellness alleged that this relief was required because either the trust did not exist or "[t]o the extent that it exists," it was a sham. J.A.19-20(¶35). Plainly, the substance of Wellness's claim was that Sharif possessed property that belonged to his bankruptcy estate under §541, a dispute based upon the Bankruptcy Code that by definition can arise only in a bankruptcy case. *See, e.g., Parks v.*

Dittmar (In re Dittmar), 618 F.3d 1199, 1204 (10th Cir. 2010); Pet.Br.14-15,27-28.

Second, Sharif argues that Wellness's §541 claim did not "arise uniquely from 'the bankruptcy itself'" because outside of bankruptcy, creditors may seek to collect their debts through the equitable remedy of piercing the corporate veil. Resp.Br.26-27. Sharif argues that if state law can be applied in some analogous way outside a bankruptcy case, then the bankruptcy court cannot decide any matter that involves that state law even if the state-law issue arises in the context of a Bankruptcy Code-based dispute, such as the property-of-the-estate determination at issue here. Although Sharif asserts he is not urging a rule that would "categorically prohibit[]" bankruptcy courts from "deciding all state-law issues," he is actually arguing more broadly, that bankruptcy courts cannot decide *federal* issues with state-law analogs. Resp.Br.37-38.

Stern does not support Sharif's argument. As Sharif acknowledges, *Stern* recognizes the authority of bankruptcy courts to allow claims against the estate. Resp.Br.26. Allowing a claim under 11 U.S.C. §502 is directly analogous to a creditor's breach of contract or tort suit against a debtor in state court—both will determine the debtor's liability to the creditor. Under Sharif's flawed argument, that comparison would doom the authority of bankruptcy court to decide whether to allow the claim. *Stern* holds otherwise. 131 S. Ct. at 2618.

The question addressed in *Stern* is not whether there is a state-law analog to the matter; instead, "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.* No action more clearly "stems from the bankruptcy itself" than an action seeking to determine whether property the debtor possesses or controls falls within the estate. The fact that state law plays an incidental role in that determination cannot transform the action into a state-law claim.

Third, Sharif contends that Wellness's §541 claim sought "to augment the bankruptcy estate by adding the property of third parties"—Wattar and Ragda—effectively arguing that they, not Sharif, were the real parties-in-interest below. Resp.Br.26.[2] But under Illinois law, if the trust existed, only Sharif, as its trustee, and not the trust beneficiaries, had the authority to sue and be sued on trust-related matters. 760 ILCS §5/4.11; *Godfrey v. Kamin*, 2000 WL 1847768, at *3-4 (N.D. Ill. Dec. 14, 2000); *cf. Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 567 (1990)

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[2] Sharif relies upon allegations Ragda made in a complaint she filed *after* the bankruptcy court ruled for Wellness to support her claim to the trust assets. Resp.Br.8-9. The bankruptcy court dismissed that complaint. 10-02239,ECF58(Bankr.N.D.Ill.Aug.24,2011). Her lawyer, however, moved to withdraw from a subsequent appeal, suggesting that Sharif backdated a document to make it appear that Ragda was a beneficiary. 11-cv-07374,ECF104(¶6)(N.D.Ill.Aug.24,2014).

("The trustee...has the sole responsibility for determining whether to settle, arbitrate, or otherwise dispose of the claim[s] [concerning a trust]"). Thus, the real party-in-interest was Sharif and, unlike in *Stern*, Wellness's claim was not an action against a third-party.

Moreover, Sharif's argument assumes the trust actually existed—the very dispute before the bankruptcy court that Sharif lost. What matters here is not whether Sharif claimed there was a trust, but whether he had possession of the property. Because he had possession, the bankruptcy court had the authority to decide the extent of Sharif's title. *See Thompson*, 309 U.S. at 481.

Finally, even if a trust were analogized to an independent legal entity, that "[m]ere legal paraphernalia" would not have prevented the bankruptcy court from deciding Wellness's §541 claim. *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 218 (1941). As the Government explains, U.S.Br.18-21, *Sampsell* recognized that creating a sham corporation would not defeat the bankruptcy court's authority to decide a property-of-the-estate dispute. 313 U.S. at 218; Pet.Br.37. That result is even more applicable to a sham trust—a real trust, if it existed, would have vested legal title and possession *in Sharif*.

Sharif challenges the Government's argument that piercing the corporate veil is an equitable remedy that exists under both state and federal law.

Resp.Br.33-35. The Government is correct. *International Financial Services Corp. v. Chromas Technologies Canada, Inc.*, one of the decisions Sharif cites, holds that under Illinois law veil-piercing is "an exercise of equitable power" and as such, is not a common law action triable to a jury. 356 F.3d 731, 737 (7th Cir. 2004); Resp.Br.27. The Government's point is simply that in applying federal law—here §541—the bankruptcy court had the authority to invoke an equitable remedy such as veil-piercing, and that doing so did not transform the action into a common law claim, as Sharif incorrectly contends.

C. Historical Practice Does Not Support Sharif's Position.

Sharif argues at length that the historical record, from the English common law forward, draws a distinction between property possessed by the debtor—which could be seized by bankruptcy commissioners for inclusion in the bankruptcy estate—and property legitimately possessed by third-parties—for which a trustee had to file suit in the appropriate court of law or equity. Resp.Br.28-32. That distinction does exist in the historical record, but does not help Sharif. He is the debtor, not a third-party. Even accepting his position that the trust actually existed, as its trustee, Sharif indisputably had possession and control of the alleged trust assets. *See* 760 ILCS §§5/4-5/4.26. Sharif also held legal title to the alleged trust assets. Bogert Trusts & Trustees, §§1,17 (3d ed. 2007).

Indeed, as trustee, Sharif was the only person who could sue and be sued with respect to these assets. 760 ILCS §5/4.11; *Godfrey*, 2000 WL 1847768, at *3-4. Thus, historically, bankruptcy commissioners (like bankruptcy judges today) would have had the authority to determine whether the alleged trust assets were property of the bankruptcy estate because those assets were in Sharif's possession.

Nor would Sharif's claim that he held the assets only nominally have helped him under English law. Statute 13 Elizabeth gave commissioners authority to examine third-parties if they held the debtor's property and Statute 1 James expanded that power to allow commissioners to issue warrants to apprehend and jail third-parties who failed to appear for examination. Thomas E. Plank, *Why Bankruptcy Judges Need Not And Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 585-86 (1998) (citing 13 Eliz., ch. 7, §5 (1570); 1 Jam., ch.15, §10 (1604).) "Commissioners could also dispose of goods and chattels of others when the bankrupt was the 'reputed owner' to the same extent as if they belonged to the bankrupt." *Id.* (citing 21 Jam., ch. 19, §11 (1623). Given that commissioners had power over debtor-owned property in the hands of third-parties, they surely had power over property the debtor himself possessed.

Sharif incorrectly suggests that commissioners lacked the power to determine whether property belonged to the bankruptcy estate, relying upon one sentence taken out of context from Professor

Brubaker's article, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall*, 86 Am. Bankr. L.J. 121, 123 (2012). Resp.Br.29. Read in context, Professor Brubaker is stating only that *if* an assignee (the English equivalent of a trustee) required a suit to recover property from a third-party, then that suit had to be filed in a court of law or equity. 86 Am. Bankr. L.J. at 123-24. But commissioners had *in rem* jurisdiction over property in the debtor's hands, *id.*, and "'full Power and Authority to take by their Discretions such Order and Direction' with the body and property of the bankrupt." Plank, 72 Am. Bankr. L. J. at 584 (quoting 13 Eliz., ch. 7, §2, cls. (2)-(9) (1570)).

Bankruptcy referees under the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (Code, tit. 11 U.S.C. §66) (repealed 1978), enjoyed the same *in rem* authority over property in the debtor's actual or constructive possession as old English commissioners. *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2170 (2014). Sharif does not dispute this point; instead, he sidesteps the crucial fact that—trust or not—because the disputed assets were in Sharif's possession, the bankruptcy court had the authority to decide title under the 1898 Act. Resp.Br.29-32.

Thompson, which Sharif cites, Resp.Br.30, succinctly demonstrates Sharif's error. In *Thompson*, a trustee for a bankrupt railroad sought to claim title (through adverse possession) to certain

land. 309 U.S. at 479. An oil company contested the trustee's title, and this Court confronted the question whether a bankruptcy court exercising summary jurisdiction could adjudicate this dispute. Noting that "the test of this jurisdiction *is not title in but possession by* the bankrupt at the time of the filing of the petition," *id.* at 481 (emphasis added), the Court found the trustee's possessory interests sufficed to authorize the bankruptcy court to adjudicate the title dispute, *id.* at 482.[3]

Under the 1898 Act, bankruptcy courts even had authority over property possessed by true, non-debtor, third-parties where the third-parties' claims to the property were merely colorable. *Taubel-Scott-Kitzmiller*, 264 U.S. at 432-33. Thus, even were *Thompson* not explicit on this point, given that bankruptcy courts had the authority under the 1898 Act to determine whether third-parties had colorable title to property in their possession, *a fortiori* bankruptcy courts would have had the lesser power

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[3] Respondent's reliance on other cases he claims delineate bankruptcy courts' summary jurisdiction is likewise misplaced. For example, in *Katchen v. Landy*, 382 U.S. 323, 334-35 (1966), Resp.Br.30, this Court held that bankruptcy courts possessed summary authority to compel creditors to surrender preferences that under §57 of the Bankruptcy Act (11 U.S.C. § 93(g) (repealed 1978)) would have led to a disallowance of their claims. Thus *Katchen*, like *Taubel-Scott-Kitzmiller* and *Thompson*, demonstrates that bankruptcy courts had authority to decide disputes about debtor property not yet in the debtor's possession.

to determine the ownership interest of the debtor himself regarding property in his own possession.

By arguing that bankruptcy courts lack authority to decide whether property in a debtor's possession is properly included in his bankruptcy estate under §541, Sharif seeks to deny bankruptcy courts one of the primary means through which they can "secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period." *Ex parte Christy*, 44 U.S. 292, 312 (1845). No legal or constitutional principle requires this unprecedented curtailment of bankruptcy courts' authority.

D. The Complete Factual Overlap Between Wellness's Discharge Claims And §541 Claim Also Gave The Bankruptcy Court The Authority To Decide The §541 Claim.

The bankruptcy court also had the authority to decide the §541 claim because, as the Government demonstrates, the bankruptcy court necessarily had to find that Sharif owned the alleged trust property to deny him a discharge. U.S.Br.16-17. The gravamen of Counts I-IV of Wellness's complaint was that Sharif concealed and lied about his ownership interest in the purported trust assets. J.A.13-19. But if Sharif did not own the purported trust assets, his statements would not have been untruthful and there would have been no basis to deny his discharge. 11 U.S.C. §727(a)(2),(3),(4)(A),(5). Thus,

there was complete factual overlap between the claims: deciding one decided the other.

Sharif acknowledges that the discharge claims were within the bankruptcy court's authority to decide because they are the "quintessential exercise of the core bankruptcy power to restructure debtor-creditor relations." Resp.Br.36. Because "normal rules of res judicata and collateral estoppel apply to the decisions of bankruptcy courts," nothing would have remained to be adjudicated in the district court on a stand-alone §541 claim once the bankruptcy court ruled on Counts I-IV. *Katchen*, 382 U.S. at 334. Thus, under *Katchen* and *Stern*, the complete factual overlap between the §541 and §727 claims made the §541 claim "'integral to the restructuring of the debtor-creditor relationship.'" *Stern*, 131 S. Ct. at 2617 (quoting *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990) (*per curiam*)).

Sharif responds that his sister Ragda's "distinct property interests" in the alleged trust assets renders *Katchen* and *Langenkamp* inapplicable. Resp.Br.36-37. But this argument assumes the trust existed, the very issue the bankruptcy court resolved against Sharif. Moreover, as explained in Section I.B., *supra*, even if one accepts Sharif's claim that the trust existed, only Sharif had standing to sue and be sued with respect to it. 760 ILCS §5/4.11. Under basic rules of res judicata and collateral estoppel, Ragda was in privity with Sharif and bound by the bankruptcy court's ruling. *See, e.g.*, *Manson v.*

Duncanson, 166 U.S. 533, 542-43 (1897) (beneficiary bound by trustee's defense of suit).

II. Bankruptcy Courts May Decide "*Stern* Claims" With Litigant Consent.

A. Consent Is Constitutionally Permissible.

The Court has consistently upheld the judgments of non-Article III adjudicators when, as is the case under 28 U.S.C. §1334 and §157, the referring court has had subject matter jurisdiction over the suit and possessed the necessary reference authority (either by tradition, statute, or rule) and the parties have consented. Pet.Br.52-57. Sharif advances three reasons why such consensual adjudications are no longer permissible.

First, making an argument that would vitiate both the bankruptcy and magistrate courts, Sharif contends that *Stern* silently overruled the Court's long-standing precedent upholding the constitutional authority of non-Article III adjudicators to decide matters with litigant consent. Resp.Br.45-46. Sharif points to *Stern's* citation of *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 851 (1986), and *Schor's* reference to structural constitutional concerns as evidence that consent is no longer permissible in separation-of-powers cases. Resp.Br.45-46. *Schor*, however, stands for the proposition that only "congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts"

are immune from notions of consent and waiver. 478 U.S. at 850 (internal quotations omitted). In all other cases, consent carries the day as evidenced by the fact that *Schor* approved the CFTC's adjudication of a common-law claim *with litigant consent*, holding "separation of powers concerns are diminished" when, as is the case under §157, "the decision to invoke [a non-Article III] forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction" remains. 478 U.S. at 855. The Court relied upon *Schor* when it held, in both *Peretz v. United States*, 501 U.S. 923, 936 (1991) and *Roell v. Withrow*, 538 U.S. 580, 588 (2003), that magistrates, which are identical in all relevant respects to bankruptcy judges, may decide civil cases and other matters with litigant consent. Unlike these cases, the litigant in *Stern* did not consent. Therefore, by citing *Schor*, *Stern* did not silently overrule the Court's prior Article III precedent.

Second, Sharif tries to distinguish the Court's precedent upholding consensual non-Article III adjudications on three grounds. Resp.Br.47-48. He dismisses *Roell* and *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263, 268 (1932), on the basis that both "were decided on statutory grounds." Resp.Br.48(emphasis removed). Sharif, however, ignores *Roell's* conclusion that Roell's "Article III right [was] substantially honored" when he gave his implied consent to proceed in a civil trial before a magistrate. 538 U.S. at 590. As for *MacDonald*, the fact that the Court did not expressly address Article III in holding that a bankruptcy court may, with the

parties' consent, enter judgment in a matter that normally would require an Article III court, is more likely because consent alleviated any constitutional concerns than because, as Sharif contends, the Court allowed a constitutional violation to pass without comment. Brubaker, 86 Am. Bankr. L.J. at 129-30.

Sharif dismisses *Peretz* on the basis that it did not involve supervision of a trial or entry of judgment, only oversight of jury selection. Resp.Br.47-48. *Peretz*, however, rejected that very distinction, equating the "responsibility and importance [of] presiding over *voir dire* at a felony trial" to the "supervision of entire civil and misdemeanor trials," noting that supervision of such trials could be "delegat[ed] to a magistrate" with "the parties' consent." 501 U.S. at 933.

Sharif also asserts that *Peretz* and earlier cases involving special masters and referees did not remove the "essential attributes of judicial power" from Article III courts because an Article III court still entered judgment. Resp.Br.47-48. But as *Peretz* noted with approval, under 28 U.S.C. §636(c)(1), magistrates can preside over jury or nonjury civil trials, 501 U.S. at 933, and "*order the entry of judgment*" with parties' consent. 28 U.S.C. §636(c)(1) (emphasis added). Upon entry of judgment, parties appeal directly to the appropriate court of appeals. *Id.*§636(c)(3).

Further, Sharif's focus on the ministerial task of entering judgment incorrectly elevates form over

substance. In all three of the early cases—*Heckers v. Fowler*, 69 U.S. 123, 127-28 (1864), *Newcomb v. Wood*, 97 U.S. 581, 583 (1878), and *Kimberly v. Arms*, 129 U.S. 512, 524 (1889)—the referee's ruling was final and the Article III court lacked the authority to change it. Thus, as *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 586 (1985) holds, "'[i]n deciding whether the Congress, in enacting the statute under review, has exceeded the limits of its authority to prescribe procedure..., *regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form but to the substance of what is required.*'" (quoting *Crowell v. Benson*, 285 U.S. 22, 53 (1932) (Court's emphasis)).

Third, Sharif incorrectly contends that under *Schor's* balancing test, his consent would not overcome the structural interests that Article III protects. Resp.Br.42-45. *Schor's* balancing test does not apply because a bankruptcy court is not an executive agency and thus, the jurisdictional structural concerns present in *Schor* are absent here. But assuming *Schor's* test applies, the distinctions that Sharif seeks to draw between this case and *Schor* are invalid. Contrary to Sharif's argument, Wellness's §541 claim depends on federal law and flows from a federal regulatory scheme. Pet.Br.27-30. Resolution of Wellness's §541 claim also is necessary to the resolution of Wellness's discharge action (which Sharif admits the bankruptcy court can decide). Section I.D., *supra*. The bankruptcy court, like the CFTC in *Schor*, also has expertise in

deciding the type of claim at issue here. Additionally, *Stern* deemed "[m]ost significant[]" that in *Schor* "it was 'necessary' to allow the agency to exercise jurisdiction over the broker's claim, or else 'the reparations procedure would have been confounded.'" 131 S. Ct. at 2613-14 (quoting 478 U.S. at 856.) Not permitting bankruptcy courts to make property-of-the-estate determinations would confound their ability to function as well.

B. Sharif Consented To The Bankruptcy Court's Entry Of Judgment.

Sharif does not argue that implied consent is constitutionally impermissible; instead, he contends that if a party can consent, Bankruptcy Rule 7012(b) mandates "express [consent] in the bankruptcy context" and that he did not expressly consent. Resp.Br.50(emphasis removed). Sharif's statutory argument fails for multiple reasons. Sharif also expressly and impliedly gave his consent.

1. Rule 7012(b) Does Not Require Express Consent.

On its face, Rule 7012(b) does not even apply:

> A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. *If the response is that the proceeding is non-core*, it shall include a statement that the party does or does not consent to entry of final

> orders or judgment by the bankruptcy judge.

Fed. R. Bankr. P. 7012(b) (emphasis added). Sharif "[a]dmitted" Wellness's allegation that the complaint was core, J.A.24, thereby making Rule 7012(b)'s requirement that Sharif include a statement of consent inapplicable.

Rule 7012(b) also does *not* reflect "Congress's judgment that only express consent" suffices in the bankruptcy context. Resp.Br.51. As Sharif acknowledges, *id.*, the applicable statute here is 28 U.S.C. §157(c). It requires only "the consent of all the parties...." *Id.* That differs from §157(e), which requires "the *express* consent of all the parties" before a bankruptcy court may conduct a jury trial (emphasis added). "[W]here Congress includes particular language in one section of a statute but omits it in another..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotations omitted).

Roell, which held implied consent sufficed under the Federal Magistrate Act (28 U.S.C. §631 *et. seq.*), supports this conclusion. Like §157, §636(c)(1) allows "a full-time [] magistrate judge" to "conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case" "[u]pon the consent of the parties." In contrast, elsewhere §636(c)(1) requires parties to consent by

"specific written request" to a referral to a part-time magistrate. *Roell* held that §636(c)(1)'s "unadorned references" to consent, when contrasted with provisions that required express consent, meant implied consent was permissible. 538 U.S. at 587.

Finally, Sharif's attempt to force Rule 7012(b)'s requirements upon §157(c)(1) fails because while the Court has "the power to prescribe by general rules,... the practice and procedure in cases under title 11...[s]uch rules shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. §2075. Thus, holding that Rule 7012(b) requires express consent when §157(c)(2) does not "would give the [Bankruptcy] Rules an impermissible effect." *See Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 454 (2004).

Hood allowed a bankruptcy court to declare a state student loan non-dischargeable, notwithstanding Rule 7001(6)'s summons requirement because the applicable statute, 11 U.S.C. §523(a)(8), did not require the state to be served by summons. 541 U.S. at 453-54. Similarly, Rule 73(b) required a statement of consent, yet *Roell* deemed implied consent sufficient because the statute did not require express consent. 538 U.S. 587 & n.5. Accordingly, Sharif's argument that Rule 7012(b) makes only express consent effective in bankruptcy cases fails.

2. Sharif Expressly Consented.

In any event, Sharif expressly consented *twice* by filing his bankruptcy petition and by moving for summary judgment. Pet.Br.61-63. Sharif dismisses as "frivolous" the Trustee's argument that he expressly consented by filing for bankruptcy. Resp.Br.53-54. Yet Sharif acknowledges that by filing for bankruptcy he "consented to the bankruptcy court's administration of his estate"—which includes determining whether his estate includes the property he possesses and previously claimed to own directly. *Id.* Section I, *supra*.

Sharif's filing also did not take place in a vacuum. Sharif strategically opted to move his dispute with Wellness from an Article III district court—which had just jailed him for discovery abuses—to the bankruptcy court, forcing Wellness to follow him from Texas to Chicago to collect its claim. Pet.App.6a. Sharif had other options: "bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors." *United States v. Kras*, 409 U.S. 434, 445 (1973). When a litigant affirmatively selects a non-Article III option, as Sharif did, that selection constitutes express consent to that forum. *Granfinanciera, S.A. v. Nordberg* explained:

> The [*Schor*] investors could have pursued their claims, albeit less expeditiously, in federal court. By electing to use the speedier, alternative procedures Congress

> had created, the Court said, the investors waived their right to have the state-law counterclaims against them adjudicated by an Article III court.

492 U.S. 33, 59n.14 (1989).

Sharif argues that the fact he "consented to the bankruptcy court's administration of his estate" does not "suggest his consent to the bankruptcy court's *adjudication of Wellness's alter ego claim.*" Resp.Br.53 (original emphasis). But this is exactly the argument this Court rejected in *Schor*, when it held that Schor "effectively agreed to an adjudication by the CFTC *of the entire controversy* by seeking relief" in the non-Article III forum. 478 U.S. at 850 (emphasis supplied). Having consented to the bankruptcy court's adjudication of his bankruptcy case, Sharif cannot now selectively limit his consent.

The concept that a debtor consents to a non-Article III adjudication by filing for bankruptcy also finds support in the analogous Seventh Amendment case law. *See Granfinanciera*, 492 U.S. at 53 (equating Article III and the Seventh Amendment); *see also* Brubaker, 86 Am. Bankr. L.J. at 150-51. The Sixth and Seventh Circuits have held that a debtor waives his Seventh Amendment jury rights by filing for bankruptcy, explaining: "[the debtor] cannot claim a right to jury trial because, as a Chapter 7 debtor, he voluntarily submitted his case to bankruptcy court." *N.I.S. Corp. v. Hallahan (In re Hallahan)*, 936 F.2d 1496, 1505 (7th Cir. 1991);

accord Longo v. McLaren (In re McLaren), 3 F.3d 958, 960-61 (6th Cir. 1993).[4]

Sharif expressly consented again by moving the bankruptcy court for summary judgment. Pet.App.10a. Although Sharif responds that a non-consenting litigant might only be asking for a recommendation of summary judgment to the district court, Resp.Br.55, that is not what happened here. Sharif asked "for the entry of summary judgment" on Wellness's §541 claim. No.09-A-00770, ECF65-1at2(Bankr.N.D.Ill.June22,2010).

Sharif further claims that he never received notice that he could withhold his consent because *Stern* had not yet been decided when he moved for summary judgment and thus, he did not know he had a basis to object. Resp.Br.55. *Stern*, however, involved the authority of the bankruptcy court under §157(b)(2)(C) to enter final judgment on a counterclaim against a creditor who had filed a proof of claim. 131 S. Ct. at 2619-20. Section 157(b)(2)(C) never applied in this case because Sharif is not a creditor who filed a claim against the estate. Thus, the fact that *Stern* had not yet held §157(b)(2)(C)

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[4] The Bankruptcy Rules, upon which Sharif places importance, similarly recognize a debtor's consent. All proceedings to recover money or property, except those brought against a debtor, require the filing of an adversary complaint and the issuance of a summons. *See* Fed. R. Bankr. P. 7001(1). A party can proceed against a debtor by motion, because the debtor and his property are already under the bankruptcy court's *in rem* authority. *Cf. Hood*, 541 U.S. at 453-54.

unconstitutional in some circumstances should not excuse Sharif's failure to raise his constitutional argument. That Sharif did not even cite *Stern* until late in his appeals, long after *Stern* was decided, underscores that Sharif understood *Stern* did not preclude the bankruptcy court from entering judgment in this case.

Thus, by invoking the bankruptcy court's *in rem* jurisdiction to escape an Article III court and then asking the bankruptcy court "for the entry of summary judgment" against Wellness, Sharif expressly consented.

3. Sharif Impliedly Consented.

Sharif cannot dispute that *Roell* upholds implied consent, but urges that implied consent can only be found if the court explicitly warns the litigant of the need for consent first. Resp.51-52. Sharif's proposed rule contradicts long-standing precedent that a "'statute is itself sufficient notice'" of the law. *City of West Covina v. Perkins*, 525 U.S. 234, 241 (1999) (quoting *Reetz v. Michigan*, 188 U.S. 505, 509 (1903)). Moreover, to the extent Sharif's argument relies upon §636(c)(2)'s notice provisions, which were honored in the breach in *Roell*, Congress did not include the same provisions in §157(c)(2). That it did not include the same provisions in §157(c)(2) indicates Congress determined that there was no need in the bankruptcy context to deviate from the general rule that litigants are presumed to know the

law. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581 (2010).

Thus, §157 gave Sharif notice. He consented by admitting the entire matter was core and never objecting to the bankruptcy court's authority to enter judgment. Sharif now seeks to avoid his consent by arguing that Wellness's "core" allegation only applied to the discharge counts. But Wellness's complaint states: "[t]his adversary proceeding is a core proceeding...." J.A.6(¶1). Sharif also argues without record support that his admission was a "mistake," Resp.Br.54, but he repeated that "mistake" in his summary judgment motion, asserting that Wellness's case was core. No.09-A-00770,ECF65-2at1(Bankr.N.D.Ill.June22,2010).

Finally, Sharif also forfeited his arguments by failing to raise his constitutional objections properly in his two appeals below, even though *Stern* preceded his first opening appeal brief. Pet.App.15a. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) does not help Sharif because, unlike Curtis Publishing, Sharif had notice of *Stern* before he appealed. While a party is not required to foresee changes in the law, "it is equally clear that even constitutional objections may be waived by a failure to raise them at a proper time...." 388 U.S. at 143. By failing to raise *Stern* when it was first "available" to him, Sharif "forfeited his [*Stern*] argument." *United States v. Feinberg*, 89 F.3d 333, 340-41 (7th Cir. 1996).

Sharif seeks to excuse his admitted forfeiture by arguing that, if Wellness's §541 claim is a "*Stern* claim," the bankruptcy court lacked authority to enter judgment thereby rendering the district court without appellate jurisdiction to decide whether the bankruptcy court had proper authority. Resp.Br.56. An appellate court, however, always possesses jurisdiction to pass on the authority of the court below. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 7 n.6 (1983); *see Brown v. Plata*, 131 S. Ct. 1910, 1930 (2011); *United States v. Ruiz*, 536 U.S. 622, 628 (2002). Thus, Sharif has no excuse for his forfeiture.

CONCLUSION

The judgment below should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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December 19, 2014

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SUPPLEMENTAL BRIEF

No. 13-935

IN THE

Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LIMITED, ET AL.

Petitioners,

v.

RICHARD SHARIF,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S SUPPLEMENTAL APPENDIX

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APPENDIX A

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

RICHARD SHARIF, Debtor.	)	No. 09 05868
	)	Honorable
	)	Jacqueline P. Cox

WELLNESS INTERNATIONAL NETWORK, LTD. a/k/a WIN, RALPH OATS and CATHY OATS, Plaintiffs,	)	
v.	)	No. 09 A 00770
RICHARD SHARIF, INDIVIDUALLY AND AS TRUSTEE OF THE SOAD WATTAR TRUST, Defendant.	)	

The videotaped deposition of RICHARD SHARIF called for examination pursuant to Notice and the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions, taken before Frances S. Lucente, a notary public within and for the County of Cook and State of Illinois, at 321 North Clark Street, Suite 2800, Chicago, Illinois, on the 13th day of May, 2010, at the hour of 11:51 a.m.

Reported by: Frances S. Lucente, CSR

License No.: 084-004005

***

[22]

***

Q. I understand. Anything besides that?

A. A license? I believe that's it as far as I know.

Q. Are you in good standing with your pharmacy license?

A. Yes.

Q. Is that with the State of Illinois?

A. Of course.

Q. Did you go to college?

A. Yes, I did.

Q. Did you graduate?

A. Yes.

Q. From what university?

A. University of Illinois College of Pharmacy.

Q. What year would that have been?

A. In 1986 I graduated.

Q. There's a lot of Sharifs, and I'm just going to try to put my own little family tree together so I can figure out who's who.

A. God bless, we are eight—four brothers and four sisters. We are eight people.

Q. If I mispronounce anyone's name, I'm not

[23] being disrespectful. Soad Wattar is your deceased mother?

A. My deceased mother.

Q. And is your father deceased?

A. Yes.

Q. What is that gentleman's name?

A. Abdul Hadi, A-b-d-u-l H-a-d-i.

Q. Wattar?

A. No, Sharifeh.

Q. Sure. And Abdul Hadi and Soad had eight children?

A. Yes.

Q. Obviously, I know you and I know of Ragda. Can you give me the other names.

A. We'll start from the top—Raja, R-a-j-a Sharif, and then Ragda Sharif, and then Richard Sharif, my name, number three. Number four is Jamal Sharif.

Q. J-a-m-a-l?

A. Yes.

Q. Next?

A. Nasser, N-a-s-s-e-r, Sharif, and then Hana H-a-n-a.

Q. H-a-n-a?

[24]

A. Yeah, Hana Sharif, then Jihad, J-i-h-a-d, Sharif.

Q. I have seven. Is there one more?

A. Haifa. I'm sorry. Haifa is before Jihad.

Q. Okay. H-a—

A. H-a-i-f-a Sharif. She uses her married name Kaj, K-a-j.

***

[28]

***

BY MR. HAIL:

Q. Is this document titled Master Loan Application a document that you received after providing information to the bank? They typed it up, sent it back to you, you reviewed it, and you signed off on it; correct?

A. Yes. They prepared it, and I signed it yes.

Q. They prepared it after talking to you, correct?

A. Actually, I need to tell you what happened here.

Q. I'm just asking did they prepare it after they—

A. They prepared it, and they put the family's assets in order for my mother to qualify for the loan. So I did all this as an accommodation to my mother and to my family, because my mother because of her age was not qualified for the loan. I had to do it, and they told me just list the family assets which my sister Ragda, Haifa, and everybody did along with my mother. They requested substantial amount of

[29] down-payment. This is the reason why. I did it as an accommodation to my mother who is illiterate in Arabic and English, and I acted as a trustee.

***

[99]

***

THE VIDEOGRAPHER: We are going back on the record at 1:59 p.m. This is the beginning of Videotape No. 2.

BY MR. HAIL:

Q. If you could go back, sir, to Exhibit

[100]

No. 3, which is the answer to the Complaint.

A. No. 3.

Q. Go to Paragraph No. 13.

A. Yes.

Q. The last sentence of the allegation was defendant has also failed to provide any documents showing the formation or the funding of any trust. Do you see that?

A. Okay. I just found it. Let me read it.

Q. Sure, read it.

A. Yeah.

Q. Do you admit or deny that you have failed to provide any documents showing the formation or funding of any trust?

A. To provide information about funding of the trust, it was done by my mother. Okay. I did not have in my possession anything to provide.

Q. Let's take it step by step. The trust was established in 1992, correct?

A. Correct.

Q. There was a legal document that would have memorialized the terms of the trust, correct? Is that correct?

A. Yes.

[101]

Q. Were you the trustee at that point in time?

A. Yes.

Q. Where is that legal document that established the trust in 1992?

A. 1992—I personally have not been able to locate it, the '92, because it's very old. We hold onto the amended one because the lawyer who established or created the trust told us that the amended one will cancel the one before it and this is, you know, what we, you know, go by.

MR. HAIL: I didn't ask anything about an amended one. I didn't ask any conversation you had with some attorney in '96. My objection is nonresponsive.

BY MR. HAIL:

Q. Have you produced to us in this litigation the 1992 trust document which established the trust, yes or no?

A. No.

Q. Thank you. Once the trust was established, various assets were put into the trust; correct?

A. After '96, yes.

***

[109]

***

Q. You indicate I believe that the trust was initially funded with an inheritance from your deceased father?

A. Right.

Q. Have you provided documents that will prove that?

A. The funds came in in terms of international wires from Beirut, Lebanon and came through a financial entity in Dubai. My mother had arrangement with her brother and her family, and she had them over the course of several years because she decided to live and reside in the United States.

Q. My question is do you have any documents

[110] evidencing any of that story?

A. I know one thing for sure, a wire, I believe for $200,000 came from Beirut. I had it in my hand during the divorce proceeding, but I haven't been able to find it. I know this for a fact. It was sent from my brother to my mother, and a couple of others. It was shown during the divorce court proceeding. My mother's own testimony mentioned that she brought money.

Q. I'm asking do you have a single document that you have produced or could show us as we sit here today that would establish the source of and the timing of the money capitalizing the trust?

A. Your Honor—Counselor, I found during the divorce I had more than one piece of information about money brought in. I was not able to find it. Okay.

MR. HAIL: I object as nonresponsive.

BY MR. HAIL:

Q. I'm sitting here today taking your deposition. Okay. I'm asking have you produced any prior to today or do you have any as you sit here today, a single document—

A. No, I don't.

***

[119]

***

MR. HAIL: Objection, nonresponsive. You're just wasting time.

THE WITNESS: Can I ask a question?

MR. STEVENS: Wait and see if he has any more questions.

MR. HAIL: Oh, yeah. I have plenty. Let's take a look at the trust itself, Exhibit 13.

(Whereupon, Deposition Exhibit No. 13 was marked for identification.)

BY MR. HAIL:

Q. This is the Soad Wattar Revocable Living Trust of 1992, amended in '96; correct?

A. Yes.

Q. And it looks like it's signed off on Page No. 11 by Soad Wattar, correct?

A. Yes.

Q. On May 15th of '96?

A. Right.

[120]

Q. At the time of signing this document or shortly thereafter, were there additional assets placed into the trust? If you don't know one way or the other, that's fine.

A. As far as I know and to the best of my recollection, prior to 1996 it was a corporation established to conduct, you know, a family business was a property

of the 1992 trust prior to '96. Now, that's all I can think about it, you know. At this moment, that's all I can remember.

Q. In Article IV, a section entitled Withdrawals by Settlor or Trustee—

A. What page?

Q. Article IV, Page 2.

A. Yeah, Article IV, by Settlor.

Q. You know what Settlor is, that's your mother?

A. Right.

Q. Did your mother ever withdraw any portion of the corpus of the trust?

A. Of the money from the trust?

Q. Yeah. Corpus means the principal amount.

A. Yes, she did.

Q. Okay. There would be documents that would

[121] reflect that?

A. Well, I have—

Q. Do you know what I mean by corpus in that amount? That's kind of a legal term even though it's the principal amount, not the interest you're making off of it. Like if you put a thousand dollars in a trust and you get five percent interest, at the end of the year you've got $1050. If you take out the 50, you'd not invaded the corpus. You've just taken the interest. Were there withdrawals of the corpus of the trust by your mother?

A. Yes. I know on many occasions she withdraw money, but I don't know about the corpus. I can't

answer this. The accountant would be in a better position to answer.

Q. Okay. Have you ever borrowed money from the trust?

A. I don't believe to the best of my recollection.

Q. In order to know that, we would have to see the underlying financial documents of the trust; wouldn't we?

A. I do not believe I borrowed money from the

[122] trust or withdrew it personally. I wasn't allowed to by my mother. My mother has lent me some money, but not the trust. The trust was sacred, you know. That's for the whole family.

Q. Has Ragda ever been a trustee of the trust?

A. She's the beneficiary but not the trustee. I'm the trustee. She's my successor trustee, and there's a third sister, Haifa, is the third successor.

Q. Yeah, I was wondering if there was any point where she stepped into your shoes as a trustee that you can recall?

A. I don't recall.

Q. Have you ever received any compensation or monies from the trust for your services?

A. No.

***

[203]

BY MR. HAIL:

Q. This appears to be a trust instrument related to the Clarendon Street properties, is that correct?

A. Yes, yes.

Q. If you look on the next page, I guess it's North Clarendon Realty Company. It appears to be signed off by your sister as president of that company, is that right?

A. Yes, that's correct.

(Whereupon, Deposition Exhibit No. 56 was marked for identification.)

BY MR. HAIL:

Q. In Exhibit No. 56, who lives in the Revere Street house now?

A. I do spend sometime there, you know. My center Ragda comes the weekends. Haifa occasionally comes and stays, you know.

Q. Does anyone live in there permanently? Does anyone make that their primary residence?

A. We're trying to figure out what to do with the house because now that the mother passed away, we are not going to leave. I mean, the family is

[204] trying to decide what to do with the house.

Q. All right. Just real quickly, this Exhibit 56, this is a warranty deed relating to the purchase of the house from the previous owners—I wish I could pronounce that name—to yourself; is that correct?

A. Yes, uh-huh.

Q. Then flip it over two more pages.

A. Uh-huh.

Q. This is a Quit Claim Deed—

A. Right, uh-huh.

Q. —between yourself and Soad Wattar, is that correct?

A. Correct.

Q. Did Soad Wattar give you any money or other consideration in connection with this Quit Claim Deed?

A. Zero.

Q. That was my first question. The next question is are there any sales agreements between Richard Sharif, individually, and Soad Wattar?

A. Absolutely not.

Q. What do you understand a Quit Claim Deed to do?

[205]

A. Counselor, next to the signature there is a signature of Tushar Chulia (phonetic). He's my mother's lawyer. He's the one who did the Quit Claim Deed back to my mother because the understanding was once she get the loan I would Quit Claim it to her because it's her house. She used her money for down payment, and she started paying the mortgage. So I wanted to get out of this, you know, responsibility, and her lawyer asked me to Quit Claim it back. I got zero interest, zero dollar from it. It was a favor for my mother, and since then it's been a hundred percent her name until today.

Q. Did anyone notify the bank that you were quit claiming?

A. Yes. When they find out, they said we have to refinance—I mean because my mother established history of payment on time, they were happy to put the loan in her name. So in October of that year, which

was a few months, I got out of it completely and it was in her name a hundred percent, and they never raised any issue.

MR. HAIL: I'm going to hand you the next 24 exhibit, Exhibit No. 57.

[206]

(Whereupon, Deposition Exhibit No. 57 was marked for identification.)

BY MR. HAIL:

Q. This is a mortgage with Soad Wattar as the borrower in April '03?

A. Right.

Q. Does this relate to the refinancing that you were talking about, if you know?

A. Yes. It is absolutely, yeah. My mother used the same bank Washington Mutual to refinance at a lower interest, and it was a substantial saving for her and they went along with that and they did it.

Q. If you look over to Page 0676, it's signed by someone as attorney in fact?

A. I can read it for you. Soad Wattar by her attorney, Chulia (phonetic) that's his handwriting. I was with him so he signed on her behalf at the closing.

MR. HAIL: Let me hand you Exhibit 58.

(Whereupon, Deposition Exhibit No. 58 was marked for identification.)

[207]

BY MR. HAIL:

Q. Exhibit 58, this is a mortgage in March of '08. The title to the property now under this mortgage is Soad Wattar—

A. Living Trust.

Q. In the trust. At some point in time between '03 when it was in her name individually and '08, for lack of a better term it was transferred into the trust?

A. Absolutely.

Q. How did that happen?

A. Mother's request.

Q. I understand. That's kind of a why. Mechanically, how did it happen?

A. Okay, two things. I remember this because I was with her and I did it. Now, not that I was with her, I remember this because it happened not too long ago. Number one, my mother had a lot of investment with Wachovia. She was a preferred client. She was subject to a lower interest rate. They told her we can give you—my mother had problem getting fixed loan for 30 years. The first time she had arm, three years arm or four. Then they were able to go along with her request, and

[208] she established history and she requested it to be put in a living trust because at the advice of her lawyer. She did that and refinanced it at lower interest and fixed rate for 30 years. That's why she moved to Wachovia because they give her special deal.

Q. If you look over to Page 0697, it looks like you signed off as the trustee and on her behalf?

A. Yeah. Here Soad Wattar by Richard Sharif, her attorney in fact, individual of Soad Wattar Revokable Living Trust of 1992 amended.

Q. Thank you.

A. I as trustee, that's how the lawyer wanted me to sign.

Q. Take a look please, it's near the back of this exhibit, there's a loan application.

A. Okay.

Q. Five or six pages from the back.

A. What number, Counselor?

Q. It's a little sketchy. It looks like maybe 0748.

A. 48?

Q. I think so. It's a Uniform Residential

[209] Loan Application.

A. Uniform—

Q. It says at the very top Uniform Residential Loan Application.

A. That's not 48.

Q. It may be 46.

A. What is the one before it so maybe I can find it?

Q. Yeah, it looks like 46. That number is a little cut off. I thought it was an 8.

A. 46. Uniform—yes.

Q. At the top there's a borrower and co-borrower?

A. Yes.

Q. Would you want to read that handwriting?

A. Soad Wattar by Richard Sharif, her attorney in fact.

Q. So this is a loan application for Soad Wattar individually, because it didn't say anything about the trust?

A. Well, the loan is in the trust. It's in the documents, it's living trust.

Q. Okay. But this loan application is for Soad Wattar individually?

[210]

A. No, it is—

Q. You know what, never mind. It looks like about halfway down Soad Wattar and then manner in which title would be held. I understand. So if you look over—

A. Individual trust.

Q. So the income and assets and that type of thing listed in this document were trust, income and assets?

A. That's the next page.

Q. Well, looking over at the assets and liabilities on the next page.

A. Yes, I see it.

Q. So are these supposed to be trust? So if you look over—

A. Yes. Trust assets, exactly.

Q. As of this period of time, the total assets—excuse me, the net worth of the trust was about 2.55 million?

A. Where does it say 2.55?

Q. If you look over, Page 0748, there's a net worth right in the middle of the page. It's got a list of assets, liabilities, and it totals into a net worth of 2.55 million?

[211]

A. Yeah.

Q. Is that correct?

A. That's her annuities, stocks and everything, yes.

Q. Yeah—no, I understand. Do you know what the net worth is today approximately?

A. Yeah, I have an idea. She lost hundreds of thousands in the market crash, so it's a lot less. I don't know exactly, you know, as we speak but it's—

Q. Okay. Take a look if you would please at Exhibit No. 4, your Interrogatory answers.

A. Exhibit No. 4?

Q. Have I given that to you yet?

A. Let me check.

MR. HAIL: You know, I may not have.

(Whereupon, Deposition Exhibit No. 4 was marked for identification.)

BY MR. HAIL:

Q. In No. 8—

A. Page No. 8?

Q. Yes—no, I'm sorry, Page 7, Interrogatory No. 8.

[212]

A. Yeah.

Q. You say I have not transferred any money belonging to me to any person or entity except for funds to pay ordinary living expenses.

Are you referring to your own ordinary living expenses?

A. No, the house in South Barrington.

Q. Well, what I'm asking for is when you refer to—are you referring to your own ordinary living expenses or those of others?

A. I have—yeah, to my personal.

MR. HAIL: Okay. Thank you. Number 11, I've already asked about that. Let's see. I want to hand you what's been marked as Exhibit No. 9.

(Whereupon, Deposition Exhibit No. 9 was marked for identification.)

BY MR. HAIL:

Q. I just have one question. I'm just going to take this last page off because this is all we need. Number 9 was a document attached to your response to a motion for sanctions. It lists out a document in a foreign language. Is that Arabic?

A. Yes.

[213]

Q. Let me mark that as an exhibit. Do you read Arabic?

A. Yes, I do.

Q. Would you be kind enough to tell me what that says.

A. This is a death certificate that says that the deceased person is Soad Wattar, the daughter of Mustaffa. The year of birth is 1929, and the cause of

death is liver psoriasis, okay liver disease. The date of death, March 17, 2010. The time of death is 6:00 a.m. in Allipo. It has a signature of doctor, Dr. Marwan Asiri (phonetic) at Louis Hospital, St. Louis Hospital in Allipo, Syria.

Q. Thank you. You can keep that in the exhibits. My Arabic is a little rusty.

MR. HAIL: Let me hand you what's been marked as Exhibit 15.

(Whereupon, Deposition Exhibit No. 15 was marked for identification.)

BY MR. HAIL:

Q. It looks like this is a Power of Attorney.

A. Yes.

[214]

Q. There is a section from an Illinois statutory form, and then it looks like it's a Power of Attorney for yourself over Soad Wattar; is that correct?

A. This is a Power of Attorney designed by Soad Wattar's lawyer, Mr. William Angelo, prepared April '07.

Q. Did you have any prior powers of attorney prior to April of '07 with regard to Soad Wattar?

A. Prior? Yes, I did.

Q. Similar, or I mean?

A. This particular one, I believe it was designed—I have one during the purchase of the house. The mother's got me the Power of Attorney to purchase the house. I have this thing requested by the mortgage company.

Q. The main thing I was trying to figure out is why does this Power of Attorney exist? Was there a particular purpose it was needed for?

A. Well, April 26, '07, I have a very clear memory. This lawyer was at the premises along with all members of the family and two witnesses and notary public. My mother made amendment to her trust. And you know we did—the lawyer, her

[215] lawyer, did provide certain services per her request along with my sister, Ragda. She established her own trust also that day. So why, to the best of my recollection, I believe this was needed to refinance the house with Wachovia.

Q. The Revere house?

A. Revere, to refinance. They needed a Power of Attorney, Illinois statute.

MR. HAIL: I want to give you what's been marked as Exhibit 16.

(Whereupon, Deposition Exhibit No. 16 was marked for identification.)

BY MR. HAIL:

Q. This is the Last Will and Testament of Soad Wattar. Does this appear to be the Last Will and Testament of Soad Wattar?

A. I believe so.

Q. There's a signature on each page of the document?

A. Yes.

Q. Does that appear to be your mother's signature?

A. That's my mother's signature.

[216]

Q. At some point in time prior to your mother's death—you may keep that handy I do have a question or two about it. At some point in time prior to your mother's death, did she become mentally disabled—I'm trying to—basically incompetent, unable to act for herself?

A. No.

Q. I'm just kind of stumbling around a little bit—just unable to communicate or think clearly enough to be able to make decisions?

A. Not at all.

Q. Article Five, it looks like in this Will, she's bequeathing her estate to the trustee of the trust. Is that right?

What number is this document again?

MR. STEVENS: 16.

MR. HAIL: 16, thank you.

BY MR. HAIL:

Q. Is it your understanding that at least as this version of the Last Will and Testament, her estate was effectively going to go to whoever was then the trustee of her trust?

A. No. The trustee's job is to govern and conduct his fiduciary of the trust, but we have

[217] trustee, successor trustee and a third one. Okay?

MR. HAIL: I understand that. Just hold off on that thought for a second. Let me go to Exhibit 17.

(Whereupon, Deposition Exhibit No. 17 was marked for identification.)

BY MR. HAIL:

Q. Exhibit 17 is the second amendment to the trust. My first question is do you know where the first amendment is?

MR. STEVENS: Exhibit 13 is the first.

BY MR. HAIL:

Q. Yeah, I guess they didn't call the first World War the first World War until they had a second one. It was probably just the word war. That makes sense.

Under the second amendment to the living trust it says here in Article Seven, after settlor's death, mother's death, the trustee shall distribute the net income and principal of trust to Richard Sharif outright and free of any Trust, is that correct?

A. What's the question here?

[218]

Q. The question is, based upon this document when your mother passed away or passes away, the trustee of her Trust is supposed to distribute everything to you?

A. I believe this has something to do with beneficiary—being a beneficiary.

Q. I'm just saying you signed this document—

MR. STEVENS: This document talks about distributing to you, individually.

THE WITNESS: Yeah. My mother made me a beneficiary here before she left the country. And I do recall after I had the case with the Federal Government, my sister at the request of my mother became

the beneficiary because of the case I had with the state, with the government. My sister made an amendment and became the beneficiary.

Q. We'll get to that one in a minute so just focus in on this document. Why is it to your understanding your mother was making you the beneficiary of the trust?

A. Because I am the oldest son in the family and the closest one to my mother. She had full trust for me running this and honoring her wishes,

[219] you know, and conducted the trust in a way to continue after her death.

Q. If you flip over a few pages to Page No. 1112.

A. Page 2?

Q. It's Page 1112. This is another amendment to the Trust?

A. Yeah.

Q. It looks like this one here is changing the net income and principal of the trust to Ragda Sharif?

A. Yes, that's the one I was referring to.

Q. If you go back to the previous—the second amendment to the living trust, which is all in the same document, it's signed off by your mother as settlor; correct?

A. Yes.

Q. Did your mother sign off on this amendment to the living trust dated—

A. No, she.

Q. Just let me complete my question. Just so we're clear, there is what's called the Second Amendment

to the Soad Wattar Revokable Living Trust of 1992 at Page 1103, and in there is a document

[220] entitled Amendment to the Soad Wattar Living Trust of 1992?

A. Yes.

Q. Page 1112, correct?

A. Correct.

Q. Your mom signed off on the amendment on Pages 1103 and beyond, correct?

A. Yeah, when she was in Chicago.

Q. But your mom did not sign off on the amendment at Page 1112, correct?

A. Yeah. She was out of the country.

Q. So you as the trustee without the written consent of the settlor changed the beneficiary of the trust?

A. It was the request of the settlor, which was my mother, when she found out about the federal case. Okay. That sent a very strong alarming signal to her and the rest of the family. And I, on October—I believe—2nd, I was arrested. So a few days afterward, after communication, she suggested, per her telephone, okay—and this is done by a lawyer—that Ragda should be the beneficiary to avoid any unnecessary complications, and I did that.

[221]

Q. If you flip—go back to Exhibit No. 13, which is the Soad Wattar Revokable Living Trust of 1992 Amended 1996?

A. Exhibit 13?

Q. Exhibit 13.

A. Yeah.

Q. Okay. Do you have that handy, sir? Exhibit No. 13, Article II describes Revocation or Amendment. That's the title, correct?

A. Yes.

Q. It says settlor hereby reserves the right to revoke or amend this trust or any part or section thereof at any time by written instrument, is that correct?

A. Yes.

Q. Where is the written instrument amending the living trust, changing the beneficiary of the trust from you to your sister?

A. From me, written?

Q. Where is the written instrument signed by your mother changing the living trust beneficiary from you to your sister?

A. Okay. Counselor, if you go to Exhibit 17, 1115, Mr. Cohen was the lawyer that did the

[222] amendment. And I believe—I have to check with him—to see, you know, what he has from the mother, you know, regarding this written notice, yeah.

Q. What you have produced to us, the last beneficiary signed off in writing by your mother is you; correct?

A. Since '07.

Q. Yes.

A. Yeah.

Q. So what we have here at page number—just to be clear—the second amendment to the trust beginning

at 1103 and signed off by your mother as settlor on Page 1104—

A. Yes.

Q. That is the last signed amendment to the trust by your mother, correct?

A. When she was in Chicago.

Q. Wherever she was.

A. Yeah—yes.

Q. When we look at the Trust, the Soad Wattar Revokable Trust, Exhibit No. 13, revocation or amendment by the settlor has to occur by written instrument; correct?

[223]

A. Okay, correct.

Q. Congratulations, you have about $4 million in your name now. You were the beneficiary of the trust according to these trust documents, weren't you?

A. Counselor, I just told you, Mr. Cohen, the lawyer who did the amendment trust, he's the one who prepared it. I got to check to see whatever document he has, and I would be more than happy to provide to you.

Q. Okay, let's go to—just to complete this document, if you flip a few more pages over—

A. What exhibit?

Q. I'm on Exhibit 17.

A. Yeah.

Q. There is a document at 1114 dated October 8, 2007?

A. 1114?

Q. Yes, sir. It's also entitled Amendment to the Soad Wattar Living Trust of 1992.

A. Yes, I see that.

Q. And it's signed by you, correct?

A. Yes.

Q. This amendment is not signed by the

[224] settlor, your mother, correct?

A. But you were asking if there is a request in writing from the settlor to an individual about changing the beneficiary. I've got to check with my sister.

MR. HAIL: Objection, nonresponsive. Can you please read my question back.

(Whereupon, the record was read.)

THE WITNESS: Yes. This one was prepared by the lawyer.

BY MR. HAIL:

Q. I didn't ask who it was prepared by.

A. Yes, it was not signed.

Q. Thank you.

A. I don't see anything.

Q. What you have given us in Exhibit No. 17 is all the amendments to the trust that you're aware of, correct?

A. All the amendments?

Q. Well, let me take it a step back. That was not a hundred percent accurate.

MR. STEVENS: I think there was one additional amendment that related to the four sisters and the insurance that was also produced.

[225]

MR. HAIL: Just a moment. I think that's what this last thing is that we were looking at, Page 1114.

MR. STEVENS: 1114, okay, yeah.

MR. HAIL: That does look like rights to insurance.

MR. STEVENS: That's the 1114. We had the earlier one, the amendment.

MR. HAIL: Here's all I'm saying, let's combine—

MR. STEVENS: Yeah, the 1114, yeah. That's the one relating to insurance.

BY MR. HAIL:

Q. Mr. Sharif, between Exhibit No. 13 and Exhibit No. 17, these are all the amendments to the Soad Wattar Living Trust, correct?

A. To the best of my recollection I don't know if this is all, but this is all what I was able to produce.

Q. Can you recall any other amendments?

A. You know, there was quite a few things. You know, I have to check with my lawyer, Mr. Cohen, and he did on several occasions discuss certain changes, and I've got to make sure that

[226] this is all that we have. I believe there is something, but I'm not sure. I have to double-check. As we speak now at the end of the day, I can't tell you this is all.

Q. Why didn't you check with Mr. Cohen before this deposition in connection with producing documents in this case?

A. I did request a copy because I didn't have one available. I got it from him and—

Q. You requested all of the amendments to the trust, and Mr. Cohen provided you everything that we've seen here today; correct?

A. Counselor, there were several attorneys William Angelo, Mr. Brian in Skokie, Michael Cohen worked on the trust. Every time the settlor decided to do any changes, she will communicate, you know, with the family, with me, with Ragda through the lawyers to do certain things, you know. As of now, at the end of the day, to tell you I have everything, I'm not sure. I have to double-check.

Q. Where are you going to double-check?

A. To see if I have in my possession or with the lawyer, because Mr. Cohen to my surprise did mention that he had the original copy of the trust of 1992. Okay. And he did mention that he had it in his office. I requested this from him. He said since he moved to a new office recently, he said I will check. So this is one of the things that I'm expecting from him, you know, in terms of documentation.

Q. Do you think we may get that sometime before trial? He moved how many months ago, three or four months ago?

A. I'm sorry?

Q. He moved about three months ago if I recall correctly?

A. I don't know the details or I mean exactly when.

Q. Did your mom after she left for Syria in '07 ever come back to the United States?

A. No, she didn't.

Q. So she never came back to the United States to sign any amendments to the trust instrument, did she?

A. No. She did it orally on the phone.

***

APPENDIX B

Declaration of Ragda Sharifeh

1. My name is Ragda Sharifeh. I am over twenty-one (21) years of age. I have never been convicted of a felony or misdemeanor involving moral turpitude. I am fully competent to make this declaration. I have personal knowledge of facts stated herein and affirm that they are true and correct.

2. I am the President and the sole owner of all of the stock issued by North Clarendon Realty Company. North Clarendon Realty Company is the beneficiary of a land trust which holds title to real property commonly known as 4343 N. Clarendon Street, Unit No. 1601 and 4343 N. Clarendon Street, Unit 1602, Chicago, IL., 60613.

3. On or about June 10, 2010, in complying with a subpoena, my attorney, Garrett S. Reidy, provided attorney, Michael Lang, a copy of a trust agreement marked as Document No. RS 0001 – RS 0004 which proves that North Clarendon Realty has been the beneficiary of Land Trust No. 31030 which has held title to the real property referred to above in ¶-3, since July 8, 1999.

4. I am also the President and the sole stock holder of North Pulaski Realty Company. North Pulaski Realty Company is the beneficiary of a land trust known as Land Trust No. 31031 which holds title to real property commonly known as 2004 N. Pulaski Road, Chicago, IL., 606039.

5. On or about June 10, 2010, in complying with a subpoena served upon me, my attorney, Garrett S. Reidy, provided attorney, Michael Lang, a copy of a Trustee's Deed In Trust marked as Document No.

RS0004- RS 0006. This Deed shows that title to the real property commonly known as 2004-10 Pulaski Road, 4000-04 Armitage Avenue is held in trust under Trust Agreement No. 31031 dated July 8, 1999.

6. I am also the President and sole owner of all of the stock issued by Hermosa Medical Management, Inc., f/k/a Hermosa Medical & Diagnostic Center which conducts its business at 2004 N. Pulaski Road, Chicago, IL., 60639.

7. On or about March 29, 2002, North Clarendon Realty Company entered into a Real Estate Contract to purchase real property commonly known as 36 Revere Drive, Barrington, IL., 60010. I also provided $10,000 in earnest money to purchase said property. The specific reason North Clarendon Realty Company had entered into said contract was because my mother, Soad Wattar wanted a home large enough to enable our other family members to visit with her from Syria.

8. On or about June 10, 2010, in complying with a subpoena served upon me, my attorney, Garrett S. Reidy, provided attorney, Michael Lang a copy of the real estate contract referred to above in ¶-7 that had been marked as Document No. RS 0009 – RS 0014.

9. That on October 8, 2007, I became the successor beneficiary to the Soad Wattar Revocable Living Trust of 1992.

10. On or about June 10, 2010, in complying with a subpoena served upon me, my attorney, Garrett S. Reidy, provided attorney, Michael Lang, a copy of an amendment to the Soad Wattar Revocable Living Trust of 1992 marked as Document No. RS 0007- RS 0008, which shows that I was named as the successor beneficiary to the Soad Wattar Revocable

Living Trust upon the death of my mother, Soad Wattar.

By: s/Ragda Sharifeh

Ragda Sharifeh declares under the penalty of perjury that the foregoing statements are true and correct

APPENDIX C

Declaration of Thomas A. Snaza

1. My name is Thomas A. Snaza. I am over twenty-one (21) years of age. I have never been convicted of a felony or misdemeanor of moral turpitude. I am fully competent to make this declaration. I have personal knowledge of the facts stated herein and affirm that they are true and correct.

2. I am a C.P.A. and I maintain my office at 3759 W. Irving Park Road, Chicago, IL., 60618. Additionally, I maintain an office located on the second floor of Hermosa's Medical Center, 2004 N. Pulaski Road, Chicago, IL., 60639.

3. That since 2003, I have prepared the Federal and State Income Tax Returns for: (1) Sharif Pharmacy, Inc., (2) Logan Square MRI & Diagnostic Center, Inc., (3) North Pulaski Realty Inc., (4) The Soad Wattar Revocable Living Trust; (5) Hermosa Medical Management, Inc., f/k/a Hermosa Medical & Diagnostic Center, and (6) Richard Sharif.

4. Approximately two months ago, I was asked by Richard Sharif to produce copies of: (1) All Federal and State Tax return for the Soad Wattar Revocable Living Trust for the years of 2002 to 2009; and (2) all of Richard Sharif's Federal and State Tax Returns for the years of 2002 thru 2009.

5. I subsequently retrieved from my computer files copies of: (1) All Federal and State Tax returns for the Soad Wattar Revocable Living Trust for the years of 2003 thru 2008; and (2) Richard Sharif's Federal and State tax return for the years of 2003 thru 2008.

6. Although, the copies of the tax returns which I turned over to Richard Sharif referred to above were not signed by either Richard Sharif or Soad Wattar, the original copies of all of the tax returns which I caused to be filed with the Internal Revenue Service and the State of Illinois were signed by either Richard Sharif or Soad Wattar.

7. In preparing the tax returns for the Soad Wattar Revocable Living Trust over the past six (6) years, I never discovered any type of financial transaction which indicated to me that Richard Sharif was using any of the assets contained in the Soad Wattar Revocable Living Trust for his own benefit to enrich himself. In addition, I never saw any financial transaction which indicated to me that Richard Sharif had received any financial compensation for acting as the Trustee of the Soad Wattar Revocable Living Trust.

By: s/Thomas A. Snaza

Thomas A. Snaza declares under the penalty of perjury that the forgoing statements are true and correct.

APPENDIX D

AMENDMENT TO THE SOAD WATTAR LIVING TRUST OF 1992

Richard Sharif, acting pursuant to the powers granted unto him under the Power of Attorney dated April 26, 2007, hereby amends the above mentioned trust instrument for the specific purpose of changing the named beneficiary of the Soad Wattar Living Trust as Amended on April 26, 2007. Therefore, I hereby delete ARTICLE VII, and substitute a new Article VII, as follows:

ARTICLE VII

Disposition of Trust Proceeds. After paying the necessary expenses incurred in the management and investment of the trust estate, including compensation as provided for herein, the Trustee shall accumulate the same during the lifetime of the Settlor.

After the Settlor's death, the Trustee shall distribute the net income and principle of the Trust to RAGDA SHARIFEH, outright and free of any Trust.

Should RAGDA SHARIFEH cease or fail to survive the Settlor, the Trustee shall distribute the net income and principal to (a) her lineal descendants and/or (b) the named beneficiary as set for in any separate Spendthrift trust set aside for that beneficiary.

Dated: October 8th, 2007

By: s/Richard Sharif
Richard Sharif

AFFIDAVIT

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

We, the attesting witnesses, state that on October 8, 2007, that we saw Richard Sharif sign the amendment referred to herein above in our presence.

By: s/Stacy Francesch
Stacy Francesch
2809 N. Rockwell Street
Chicago, Illinois 60618

By: s/Edward Bontkowski
Edward Bontkowski
6218 N. Nordica Street
Chicago, Illinois 60631

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:

RICHARD SHARIF,

Debtor,

No. 09-B-~~08568~~ 05868
Hon. Jacqueline Cox
Chapter 7

RAGDA SHARIFEH, in her capacity as the Successor Trustee and Successor Beneficiary of the Soad Wattar Revocable Living Trust,]

Plaintiff,

v.

HORACE FOX, JR., in his capacity as the U.S. Trustee of Richard Sharif's bankruptcy estate and RICHARD SHARIF in his capacity as the former Trustee of the Soad Wattar Revocable Living Trust,

Defendants.

Adversary No. _____

ADVERSARY COMPLAINT TO RECOVER PROPERTY AND DECLARATORY JUDGMENT

Plaintiff, Ragda Sharifeh, in her capacity as the Successor Trustee and Successor Beneficiary of the Soad Wattar Revocable Living Trust, by and through her attorney, Garrett S. Reidy, complaining of Defendants, Richard Sharif in his capacity as former Trustee of the Soad Wattar Revocable Living Trust and Horace Fox, Jr., in his capacity as the U.S. Trustee of Richard Sharif's bankrupt estate states as follows:

JURISDICTION AND VENUE

1. This matter is before the Court pursuant to 28 U.S.C. § 157 and referred here by District Court Operating Procedure Rule 15(a) of the United States District Court for the Northern District of Illinois. Subject matter jurisdiction lies under 28 U.S.C. §1334 because this proceeding arises under title 11 of the United States Code (the "Bankruptcy Code"), and arises in and is related to Defendant, Richard Sharif s bankruptcy case.

2. Venue is proper in the Northern District of Illinois lies under 28 U.S.C. § 1409 because this adversary proceeding arises in and relates to a bankruptcy case pending in this district.

3. This matter proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O), and in the event said proceeding does not constitute a core proceeding this court has authority to issue findings of fact and conclusions of law upon which the District Court may enter orders after appropriate proceedings.

4. Plaintiff's claim for declaratory judgment arises under the Declaratory Judgment Act 28 U.S.C. §§ 2201 and 2202 and a case of actual controversy exists within the jurisdiction of this Court.

PARTIES

5. Defendant, Richard Sharif, is the Debtor in the underlying bankruptcy proceeding related to this adversary proceeding.

6. Defendant, Horace Fox, Jr., is the U.S. Bankruptcy Trustee, assigned to Richard Sharif's bankruptcy proceeding.

7. Plaintiff, Ragda Sharifeh, is the brother of Defendant, Richard Sharif. She is also the successor trustee and successor beneficiary of the Soad Wattar Revocable Living Trust.

FACTS

8. On July 8, 2005, in the United States District Court for the Northern District of Texas, Defendant, Richard Sharif acting as the agent for Soad Wattar, Ragda Sharifeh, Haifa Kaj, along with Waqar and Shafqut Khan and Abdul and Shaheen Rashid, filed a Civil Rico Cause of Action against Wellness International Network, Ltd., Win Network Inc., Ralph Oats, Cathy Oats and Sherri Matthews, (hereinafter collectively referred to as "WIN") wherein they sought to recover almost $1 million they had lost in an alleged pyramid scheme being operated by WIN. Said lawsuit was docketed in the U.S. District Court for the Northern District of Texas as Case No. 05-CV-1367.

9. During the course of the proceedings related to said lawsuit, U.S. District Court Judge Jane Boyle dismissed Soad Wattar, Haifa Kaj and Ragda Sha-

rifeh as plaintiffs in said action. Additionally, Judge Boyle also dismissed Sherri Matthews as a defendant.

10. WIN subsequently moved Judge Boyle for summary judgment on the grounds, *inter alia*, that admissions which went unanswered by plaintiffs' attorneys were deemed admitted, and therefore, the admissions conclusively negated each and every claim being asserted by the plaintiffs. Consequently, Judge Boyle granted WIN's motion for summary judgment. Richard Sharif and the other plaintiffs appealed this judgment to the U.S. Court of Appeals for the Fifth Circuit. However, the Fifth Circuit Court of Appeals affirmed all of Judge Boyle's rulings and remanded the case to Judge Boyle for consideration of WIN's motion for attorney fees.

11. In accordance with the instruction from the Fifth Circuit, the district court awarded WIN over $650,000 in attorney fees ("the judgment") after the plaintiffs' attorney, who had been temporarily suspended from being able to practice law by the Illinois Supreme Court failed to file any response to WIN's renewed motion for attorney fees.

12. Subsequently, the Khans and Rashids entered into a settlement agreement with WIN to resolve the judgment that had been entered jointly against them and Richard Sharif. However, Richard Sharif did not enter into any settlement agreement with WIN and instead filed for bankruptcy protection in the U.S. Bankruptcy Court for the N.D. of Illinois wherein he sought to have the judgment entered in favor of WIN, *inter alia* discharged. Said Bankruptcy was docketed in the N.D. of Illinois as Case No.09-BK-05868.

13. On August 24, 2009, WIN initiated an Adversary Proceeding in Richard Sharif's Bankruptcy Proceeding which opposed Richard Sharif being discharged from paying the judgment for attorney fees which had been entered against him in favor of WIN. In their complaint WIN's grounds for opposing Richard Sharif's discharge was predicated upon, *inter alia*, a mortgage loan application submitted to Washington Mutual Bank in 2002, wherein Richard Sharif claimed that he owned almost $5 million in assets.

14. Win also alleged in their adversary complaint that the Soad Wattar Revocable Living Trust was the *alter ego* of Defendant, Richard Sharif. Additionally, WIN requested the court to enter a declaratory judgment which declared the Soad Wattar Revocable Living Trust to be the *alter ego* of Defendant, Richard Sharif.

15. At no time during the period in which WIN's adversary proceeding was pending in the bankruptcy court, did Defendant, Horace Fox, Jr., in his capacity as the trustee of Richard Sharif's bankrupt estate file any pleading which requested the bankruptcy court to declare the Soad Wattar Revocable Living Trust to be the *alter ego* of Defendant, Richard Sharif.

16. On July 6, 2010, Judge Jacqueline Cox granted WIN's motion for a default judgment and sanctions based upon *inter alia*: (1) Richard Sharif's purported failure to provide documents related to the disposal of assets listed on the loan application mentioned above in ¶-12; and, (2) Richard Sharif s purported failure to provide documentation related to the funding of the Soad Wattar Revocable Living Trust created in 1992. In addition, Judge Cox also

sanctioned Richard Sharif in ruling that the Soad Wattar Revocable Living Trust was Richard Sharif's *alter ego*.

17. On July 14, 2010, based upon Judge Cox's order referred to above at ¶-15, attorney, Bruce de'Medici in his capacity as the attorney for U.S. Bankruptcy Trustee, Horace Fox, Jr., transmitted a facsimile transmission to John G. Stumpf, President and CEO of Well Fargo Advisors which advised him that Horace Fox, Jr., owned all legal and equitable interest in funds contained in Account No. 296-281204-009. Said account was held in the name of the Soad Wattar Revocable Living Trust and Richard Sharif as Trustee. However, Plaintiff Ragda Sharifeh did not become aware of Bruce de' Medici's fax of July 14, 2010 transmitted to Wells Fargo until July 28, 2010.

18. On July 19, 2010, Ragda Sharifeh and Hafi Kaj who were never named as parties in any of Richard Sharif's bankruptcy proceedings caused a complaint to be filed in the Circuit Court of Cook County docketed as Case No. 2010-CH-30432. Said Complaint sought declaratory judgment and injunctive relief. On July 21, 2010, Circuit Court Judge Martin S. Agram entered a temporary restraining order which prohibited Richard Sharif from distributing any of the assets contained in the Soad Wattar Revocable Living Trust to any of Richard Sharif's judgment creditors.

19. Shortly after said restraining order was entered, Richard Sharif resigned as the Trustee of the Soad Wattar Revocable Living Trust and pursuant to the terms of said trust, Ragda Sharifeh became the

Successor Trustee of the Soad Wattar Revocable Living Trust.

20. On July 29, 2010, Ragda Sharifeh appeared at the office of Wells Fargo Financial Advisors LLC located in Naperville, Illinois. Said appearance was made for the specific purpose of submitting documents to Wells Fargo that showed that she was the successor trustee of the Soad Wattar Revocable Living Trust. In addition, Ragda Sharifeh presented Wells Fargo an amendment made to the Soad Wattar Revocable Living Trust on October 8, 2007. Said amendment showed that she has been the successor beneficiary of the Soad Wattar Revocable Living Trust since October 8, 2007.

21. On July 29, 2010, although, Wells Fargo Financial Advisor, Paul Payne, accepted said documents from Ragda Sharifeh which showed that she was the successor trustee and successor beneficiary of the Soad Wattar Revocable Living Trust. Nevertheless, based upon the letter Wells Fargo had received from Horace Fox's attorney, Bruce de'Medici,. Paul Payne advised Ragda Sharifeh that unless she obtained a court order which allowed her access to the assets being held by Wells Fargo for the Soad Wattar Revocable Living Trust that she could not obtain or transfer any funds or other assets being held by Wells Fargo.

22. On July 30, 2010, Ragda Sharifeh and Haifa Kaj caused an amended complaint to be filed in Case No. 2010-CH-30432 (Circuit Court of Cook County) which named Wells Fargo Financial Advisors, LLC as an additional defendant. In addition, on said date, Ragda Sharifeh also filed an emergency motion for preliminary injunction and to compel Wells Fargo

to turn over the assets contained in the Soad Wattar Revocable Living Trust to her which was subsequently heard by Judge Agram on August 2, 2010.

23. On August, 2, 2010, Horace Fox's attorney, Bruce de' Medici filed an appearance in Case No. 2010-CH-30432. Also on said date, during a hearing held on Ragda Sharifeh's Emergency Motion before Judge Agram, attorney, Bruce de'Medici advised Judge Agram that he intended to remove Case No. 2010-CH-30432 from the Circuit Court of Cook County, Illinois, into the United States Bankruptcy Court for the Northern District of Illinois. However, at this juncture, the case file in Case No. 2010-CH-3042 does not contain any Removal Notice being filed by attorney, Bruce de' Medici on behalf Horace Fox, Jr. as the Trustee of Richard Sharif's bankruptcy estate.

24. On August 4, 2010, the bankruptcy court heard Horace Fox's motion to compel the turn over of the assets contained in the Soad Wattar Revocable Living Trust or assets being held by the Hartford Insurance Company to Horace Fox as the Trustee of Richard Sharif's bankruptcy estate. Subsequently, the bankruptcy court directed Horace Fox's attorney, Bruce de' Medici to draft an appropriate order. A copy of the order which was subsequently entered on August 5, 2010 is attached hereto as Exhibit No. 1.

Count 1
Wrongful Conversion of Assets Owned by the Soad Wattar Revocable Living Trust

25. Plaintiff realleges and reasserts Paragraphs 1 through 24 of its Complaint as though set forth herein as Paragraph 25 of Count I of its Complaint.

26. During December of 1991, Plaintiff's mother, Soad Wattar, who passed away on March 17, 2010, retained Marshall Teichner, for the specific purpose of establishing the Soad Wattar Revocable Living Trust. The original trust documents prepared by Marshall Teichner were executed by Soad Wattar on January 7, 1992 and reveal that Soad Wattar appointed Defendant, Richard Sharif as the Trustee of said Trust.

27. The original trust documents executed in January of 1992 related to the Soad Wattar Revocable Living Trust reveal that the purpose of establishing said trust was to create an entity to hold and administer Soad Wattar's assets into a living trust which she had received in an inheritance outside of the United States as the result of the death of her husband, Abdulhadi Sharifeh, in the country of Syria during 1988.

28. Since the time the Soad Wattar Revocable Living Trust has been established in January of 1992, several amendment have been made to the Soad Wattar Revocable Living Trust of 1992, including and not limited to two amendments made on October 8, 2007, which: (1) named Ragda Sharifeh as the successor beneficiary of the Soad Wattar Revocable Living Trust upon the death of Soad Wattar; and, (2) which named Haifa Kaj, Raja Sharifeh, Hana Sharifeh and Ragda Sharifeh as beneficiaries of life insurance policy number VL9319377issued by the Hartford Life and Annuity Company.

29. On February 24, 2009, Defendant, Richard Sharif, filed a Chapter 7 voluntary petition for bankruptcy docketed as Case No. 09-BK-05868 in the Northern District of Illinois. Subsequently, Defend-

ant, Horace Fox, Jr. was appointed as the U.S. Bankruptcy Trustee over Richard Sharif's bankrupt estate.

30. In his bankruptcy petition, Defendant,, Richard Sharif listed WIN as one of his unsecured creditors. Subsequently on June 23, 2009, WIN its proof of claim in the amount of $655,596.13.

31. On August 24, 2009, Win filed an adversary complaint opposing Defendant, Richard Sharif, from being discharged from paying the judgment for attorney fees which had been entered against him.

32. In their adversary complaint, WIN alleged, *inter alia*, that the Soad Wattar Revocable Living Trust was the *alter ego* of Defendant, Richard Sharif and requested *inter alia*, relief in the form of a declaratory judgment which declared the Soad Wattar Revocable Living Trust to be the *alter ego* of Defendant, Richard Sharif.

33. At the time WIN raised an *alter ego* claim in their adversary complaint, Defendant, Horace Fox, Jr., knew or should have known that WIN did not have standing to raise an *alter ego* claim.

34. Moreover, on April 21, 2010, Defendant, Horace Fox, Jr., advised Judge Cox, that Defendant, Richard Sharif, had produced documentation related to the Soad Wattar Revocable Living Trust in complying with an order entered on October 27, 2009.

35. Therefore, based on the documents which Richard Sharif's attorney, William J. Stevens turned over to Defendant, Horace Fox, Jr., which were related to the Soad Wattar Revocable Living Trust, Defendant, Horace Fox, Jr., knew that the Soad Wattar

Revocable Living Trust was a valid living trust under Illinois Law.

36. Likewise, based upon the documents which Richard Sharif's attorney, William J. Stevens turned over to Defendant, Horace Fox, Jr., which were related to the Soad Wattar Revocable Living Trust, Defendant, Horace Fox, Jr., also knew that the Soad Wattar Revocable Living Trust was not the *alter ego* of Defendant, Richard Sharif.

37. Similarly, based upon the documents which Richard Sharif s attorney, William J. Stevens turned over to Defendant, Horace Fox, Jr., which were related to the Soad Wattar Revocable Living Trust, Defendant, Horace Fox, Jr., knew that an amendment had been made to the Soad Wattar Revocable Living Trust on October 8, 2007, which named Plaintiff, Ragda Sharifeh, as the successor beneficiary of the Soad Wattar Revocable Living Trust upon the death of Soad Wattar.

38. On June 10, 2010, Plaintiff, Ragda Sharifeh, in complying with a subpoena served upon for her by WIN to take her deposition and production of documents produced a copy of the amendment made to the Soad Wattar Revocable Living Trust on October 8, 2007, which revealed Plaintiff, Ragda Sharifeh had become the successor beneficiary of the assets contained in the Soad Wattar Revocable Living Trust in light of WIN being informed that Soad Wattar passed away on March 17, 2010.

39. However, on July 6, 2010, Judge Cox granted WIN's Motion for Default Judgment and Sanctions against Defendant, Richard Sharif and entered an order which stated, *inter alia*, that the Soad Wat-

tar Revocable Living Trust was the *alter ego* of Defendant, Richard Sharif.

40. On July 14, 2010, based upon the Judge Cox's order entered on July 6, 2010, referred to above at ¶-39, Defendant, Horace Fox, Jr., by and through his attorney, Bruce se' Medici advised Wells Fargo Financial Advisors that Defendant, Horace Fox, Jr., in his capacity as the U.S. Bankruptcy Trustee of Richard Sharif s bankrupt estate owned all legal and equitable interest in funds being held by Wells Fargo in the name of the Soad Wattar Revocable Living Trust and Richard Sharif as Trustee.

41. On July 27, 2010, Defendant, Horace Fox, Jr. by and through his attorney, Bruce de' Medici, filed a Second Motion of Trustee for Turnover of Property of Property of Estate. Said motion incorrectly stated in ¶-3, *inter alia*, "The debtor produced the original Soad Wattar Revocable Living Trust (the "Soad Wattar Trust ") and the Last Will and Testament of Soad Wattar, but not an amendment thereto...."

42. The statement referred to above is incorrect for the following reasons: (1) Richard Sharif did not produce a copy of the original Soad Wattar Revocable Living Trust because he was not in possession of a copy of the original Soad Wattar Revocable Living Trust of 1992; and, (2) Richard Sharif only produced copies of Amendments made to the Soad Wattar revocable Living Trust made on May 15, 1996, April 26, 2007 and October 8, 2007.

43. Therefore, Defendant, Horace Fox, Jr., knew that Plaintiff, Ragda Sharifeh, was the successor beneficiary of the Soad Wattar Revocable Living Trust when he caused his attorney to file a motion

on July 27, 2010, seeking the turnover of the assets contained in the Soad Wattar Revocable Living Trust to himself as the U.S. Trustee of Richard Sharif s bankrupt estate.

44. Likewise, on August 4, 2010, Defendant, Horace Fox, Jr., also knew that Ragda Sharifeh was the successor beneficiary of the assets contained in the Soad Wattar revocable Living Trust when he caused his attorney, Bruce de' Medici to appear before Judge Cox to obtain the order attached hereto as Exhibit No. 1.

45. At all times prior to July 6, 2010, Defendant, Horace Fox, Jr., knew that Plaintiff, Ragda Sharif, was the successor beneficiary of the assets contained in the Soad Wattar Revocable Living Trust which were being held by Wells Fargo Financial Advisors as custodians of the assets of contained in the Soad Wattar revocable Living Trust.

46. At all times prior to July 27, 2010, and at all times thereafter, Defendant, Horace Fox, Jr., despite his having personal knowledge that Plaintiff, Ragda Sharifeh, was the successor beneficiary of the assets contained in the Soad Wattar Revocable Living Trust, never served any notice upon Plaintiff, Ragda Sharifeh, which gave Ragda Sharifeh notice that he filed pleadings in the bankruptcy court to have the assets contained in the Soad Wattar Revocable Living turned over to him in his capacity as the U.S. Trustee of Defendant, Richard Sharif s bankrupt estate.

47. That the actions of Defendant, Horace Fox, Jr., in failing to give Plaintiff, Ragda Sharifeh any notice to seek the assets contained in the Soad Wattar revocable Living Trust being turned over to him

as the U.S. Trustee over Defendant, Richard Sharif's bankrupt estate has unconstitutionally and unlawfully disentitled Ragda Sharifeh out of her legal and equitable rights of ownership to the assets contained in the Soad Wattar Revocable Living Trust.

WHEREFORE, it is respectfully requested that the Court enter an order directing Defendant, Horace Fox, Jr., to immediately turn over to Ragda Sharifeh, all assets presently in his custody or under his control pursuant to the order entered on August 5, 2010, a copy of which is attached hereto as Exhibit No. 1.

Count II

Plaintiff's Request For Declaratory Judgment

48. Plaintiff realleges and asserts Paragraphs 1 through 47 of its Complaint as though set forth herein as Paragraph 48 of Count II of its Complaint.

49. Pursuant to an Amendment made to the Soad Wattar Revocable Living Trust on October 8, 2007, Plaintiff, Ragda Sharifeh, was named as the Successor Beneficiary to the Soad Wattar revocable Living Trust upon the death of Soad Wattar.

50. Pursuant to an Amendment made to the Soad Wattar Revocable Living Trust on October 8, 2007, Plaintiff, Ragda Sharifeh, and her sisters, Haifa Kaj, Raja Sharifeh and Hana Sharifeh were named as Successor Beneficiaries of Policy Number VL 9319377 issued by the Hartford Life and Annuity Company which insured the life of Soad Wattar. Soad Wattar passed away on March 17, 2010.

51. On or about July 21, 2010, Defendant, Richard Sharif, acting upon the advice of his attorney, William J. Stevens, tendered written notice to Plain-

tiff, Ragda Sharifeh, that he had resigned his position as the Trustee of the Soad Wattar Revocable Living Trust.

52. Pursuant to the terms and conditions set forth in the Soad Wattar Revocable Living Trust based upon Defendant, Richard Sharifeh resigning his position as the Trustee of the Soad Wattar Revocable Living Trust on July 21, 2010, Plaintiff, Ragda Sharifeh is the Successor Trustee of the Soad Wattar Revocable Living Trust.

53. Defendant, Richard Sharif, filed his Chapter 7, Voluntary Bankruptcy Petition on February 24, 2009. The filing of a bankruptcy petition creates an estate consisting of the debtor's property. 11 U.S.C. § 541(a). Although federal law determines when a debtor's property is property of the estate under section 541, whether a debtor has an interest in the first place depends on state law. "Property interest are created and defined by state law." and in the bankruptcy laws "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." ***Butner v. United States***, 440 U.S. 48, 54-55 (1979).

54. During the period of time in which Defendant, Richard Sharif, served as the Trustee of the Soad Wattar Revocable Living Trust, Richard Sharif, did not personally possess any legal or equitable interest in any of the assets contained in the Soad Wattar Revocable Living Trust. Therefore, at the time Defendant, Richard Sharif, filed his voluntary petition for bankruptcy, Richard Sharif, did not personally possess and legal or equitable interest in any of the assets contained in the Soad Wattar Revocable

Living Trust. ***See, Dunham v. Kisak,*** 192 F.3d 1104, 1009 (7th Cir. 1999).

55. In Illinois, Trusts are construed in the same manner as wills. ***In re McCoy,*** 274 B.R. 751 (N.D. Ill. 2002) (citing ***Harris Trust and Sav. Bank v. Donovan,*** 582 N.E.2d 120, 123, 145 Ill.2d 166 (Ill. 1991). Additionally, in Illinois, estates vest at the earliest opportunity and will vest upon the death of the testator unless a later time for vesting is indicated by the express terms of the instrument or necessarily implied from them. ***Geiger v. Geer,*** 69 N.E.2d 848, 395 Ill. 367 (1948).

56. Moreover, Trusts like contracts, are to be enforced by their plain meaning and terms and will not be construed beyond the four corners of the document. ***In re Hawley,*** 2004 WL 3300098, *5 (Bankr. C.D.Ill. 2004) (citing ***Northern Trust Co. v. Torre,*** 427 N.E.2d 1217, 86 I11.2d 441 (Ill. 1981).

57. The Amendment made to the Soad Wattar Revocable Living Trust on October 8, 2007, gave Plaintiff, Radga Sharifeh all legal and equitable interest in the assets contained in the Trust upon the death of Soad Wattar who died on March 17, 2010.

58. The Amendment made to the Soad Wattar Revocable Living Trust on October 8, 2007, also gave Ragda Sharifeh, Haifai Kaj, Hana Sharifeh, and Raja Sharifeh all legal and equitable interest in the proceeds of Life Insurance Policy Number VL9319377 upon the death of Soad Wattar who died on March 17, 2010.

59. Federal Courts are empowered to give declaratory judgments by the Declaratory Judgment Act. 28 U.S.C. § 2201. To support a declaratory judgment action there must be a substantial contro-

versy that is real and immediate between parties with adverse legal interest. ***Maryland Casually Co., v. Pacific Coal & Shell Oil Co.***, 312 U.S. 270, (1942). See also, ***VMS Ltd. Partnership Sec. Litigation v. Prudential Sec. Inc., (In re VMS Sec. Litigation)*** 103 F.3d 1317, 1327 (7th Cir. 1995). The primary purpose of the Declaratory Judgment Act is to "avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damages had accrued." ***Cunningham Bros., Inc. v. Bail,*** 407 F.2d 1165, 1167-1168 (7th Cir. 1969).

60. Plaintiff, Ragda Sharifeh seeks a declaration of her right to legal and equitable ownership of the assets contained in the Soad Wattar Revocable Living Trust as the Successor Beneficiary of the Trust. The assets of the Trust are presently in the possession and/or under the control of Defendant, Horace Fox, Jr., in his capacity as the U.S. Trustee of Defendant, Richard Sharif's bankrupt estate. There is an actual controversy between Ragda Sharifeh and Horace Fox, Jr., because, Ragda Sharifeh has already suffered an injury and is being threatened by future injuries arising from Horace Fox, Jr., being in possession and/or control of assets contained in the Soad Wattar Revocable Living Trust.

61. Plaintiff, Ragda Sharifeh, also seeks declaration of her rights as one of the beneficiaries of Life Insurance Policy No. VL9319377 on her own behalf and on behalf of her sisters, Haifai Kaj, Raja Sharifeh and Hana Sharifeh in her capacity as Successor Trustee of the Soad Wattar Revocable Living Trust.

62. Plaintiff, Ragda Sharifeh has standing to bring this declaratory judgment action individually and in her capacity as the Successor Beneficiary of the Soad Wattar Revocable Living Trust and in her capacity as the Successor Trustee of the Soad Wattar Revocable Living Trust.

WHEREFORE, it is respectfully requested that the Court enter a declaratory judgment which declares:

A.The assets of the Soad Wattar Revocable Living Trust which are presently in the possession and/or under the control of Horace Fox, Jr., pursuant to the order entered by Judge Cox on July 6, 2010 are not the property of Richard Sharif s bankrupt estate;

B.Ragda Sharifeh is the legal and equitable owner of the assets contained in the Soad Wattar Revocable Living Trust pursuant to an Amendment made to the Soad Wattar Revocable Living Trust on October 8, 2007, based upon her being named as the Successor Beneficiary of said Trust in light of Soad Wattar's death on March 17, 2010; and,

C.Ragda Sharifeh, Haifa Kaj, Raja Sharifeh and Hana Sharifeh are the beneficiaries of Life Insurance Policy No. VL 9319377 issued by the Hartford Life and Annuity Company and are entitled to paid the benefits of said policy as the result of Soad Wattar's death on March 17, 2010.

Respectfully submitted,

s/Garrett Reidy

Garrett S. Reidy, attorney for
Ragda Sharifeh
2305 Sunnyside Avenue
Westchester, IL 60154
(708) 415-1887
Attorney No. 24678

[EXHIBIT 1]

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

IN RE:	No. 09-05868
RICHARD SHARIF,	Hon. Jacqueline P. Cox
	Chapter 7
Debtor,	Hearing Date: 8/4/10 at 9:30 a.m.

SECOND ORDER DIRECTING DEBTOR TO TURN OVER PROPERTY

This cause coming on to be heard upon the second motion of Horace Fox, Jr., not individually but solely as trustee (the "Trustee") for Richard Sharif, debtor herein (the "Debtor"), to request an order pursuant to 11 U.S.C. §§521 and 542(a) directing the

Debtor to forthwith account for and turn over any certain assets, as set forth below; the Trustee provided due notice of the motion; and the Court having heard the representations of the parties and being advised in the premises, orders as follows:

A. Pursuant to 11 U.S.C. §§521(3) and 542(a), Hartford Financial Services Group, Inc. shall forthwith account for and turn over to the Trustee any and all beneficial, equitable, legal, or other interests attributable to, concerning, in, or related to any life insurance policies issued by any Hartford insurance entity concerning or related to the Debtor or Soad Wattar or the Soad Wattar Revocable Living Trust.

B. Pursuant to 11 U.S.C. §§521(3) and 542(a), Wells Fargo Advisors Financial Network, LLC shall process all necessary documents to reflect change in ownership from Soad Wattar Revocable Living Trust to Horace Fox, Jr., as bankruptcy trustee for the estate of Richard Sharif, for each of the following: the Richard Sharif TTEE accounts numbered 2179-0174, 1780-6239, and 1191-4483; and the WFBNA Collateral Account FBO Soad Wattar Revocable Living Trust, Richard Sharif, TTEE, 8755-9852, 6338-1234, 2884-6825, 2667-2360

C. Pursuant to 11 U.S.C. §§521(3) and 542(a), the Debtor shall forthwith account for and turn over to the Trustee any and all beneficial, equitable, legal, or other interests attributable to, concerning, in, or related to any other accounts with any financial or investment institution concerning or related to the Debtor or Soad Wattar or the Soad Wattar Revocable Living Trust and any other assets, including but not limited to cash, checks, negotiable instruments (or other value in any form) of or from, or attributable

to, the Soad Wattar Revocable Living Trust.

D. The Debtor, Ragda Sharifeh, and Haifa Kaj are ordered to cease any act to exercise any control over property of the estate and shall not perform any conduct that amounts to exercising any control over property of the estate, including any control or distribution over any life insurance policies issued by any Hartford insurance entity concerning or related to the Debtor or Soad Wattar or the Soad Wattar Revocable Living Trust and any Wells Fargo/AG Edwards accounts concerning or related to the Debtor or Soad Wattar or the Soad Wattar Revocable Living Trust, including but not limited to the accounts specified in Paragraph B of this Order.

Date: August 5, 2010

s/Jacqueline P. Cox
Bankruptcy Judge

Bruce de'Medici #6184818
Smith Amundsen
150 North Michigan Avenue
Suite 3300
Chicago, Illinois 60601
Tel.: 312.894.3381
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APPENDIX F

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 7
	)	
	)	
RICHARD SHARIF,	)	Case No. 09 B 05868
	)	
	)	
Debtor.	)	Judge Jacqueline P. Cox

ORDER ON PETITION TO INTERVENE ON BEHALF OF THE SOAD WATTAR REVOCABLE LIVING TRUST OF 1992 AND RAGDA SHARIFEH (Dkt. 68)

Ragda Sharifeh claims to be both the successor trustee and the successor beneficiary of the Soad Wattar Revocable Living Trust of 1992 ("Soad Wattar Trust"). In those capacities and on her own behalf she asks pursuant to Federal Rule of Bankruptcy Procedure 2018 that she be allowed to intervene in this matter as to the following two orders: the July 6, 2010 order (dkt. no. 53) where this court held that the Soad Wattar Trust was the *alter ego* of the Debtor, Richard Sharif, and the August 5, 2010 order (dkt. no. 63) directing Wells Fargo Financial Advisors to turn over assets held in the name of the Soad Wattar Trust to Horace Fox, Jr., in his capacity as the Trustee of the Debtor's bankruptcy estate.

I. Background

Prior to filing his chapter 7 petition, the Debtor, Richard Sharif, was involved in litigation in the Federal District Court for the Northern District of Texas. The Debtor and several other parties filed a complaint on July 8, 2005 against Wellness International Network, Ltd.; WIN Network, Inc.; Ralph Oats; Cathy Oats and Sheri Matthews (collectively "WIN") in the United States District Court for the Northern District of Texas asserting fraud, RICO and other claims, seeking damages of nearly $1 million. Amended Complaint Objecting to Discharge, Case No. 09 B 05868, Adversary Proceeding No. 09-00770, dkt. no. 10, at p. 2 (the "Am. Compl."). The Debtor and his co-plaintiffs did not initiate discovery in that action and did not cooperate with WIN's efforts to obtain discovery. *Id.* The Debtor and his co-plaintiffs had admissions deemed against them for their failure to respond to discovery requests. WIN moved for summary judgment on the ground that the admissions negated all claims asserted; the Debtor and his co-plaintiffs failed to introduce any evidence in support of the claims. *Id.* The district court granted summary judgment against the Debtor Richard Sharif and his co-plaintiffs on those grounds. *Id.* The Debtor and his co-plaintiffs appealed the entry of summary judgment to the Fifth Circuit in 2007. *Id.* The Fifth Circuit affirmed all of the district court's rulings and noted:

> A review of the record on appeal demonstrates that Appellants' untimely performance in this court mirrors a lengthy history in the district court of dilatoriness and hollow posturing interspersed with periods of nonperformance or insubstantial performance and compliance by

> Appellants and their counsel, leaving the unmistakable impression that they have no purpose other than to prolong this contumacious litigation for purposes of harassment or delay, or both. The time is long overdue to terminate Appellants' feckless litigation at the obvious cost of time and money to the Defendants by affirming all rulings of the district court but remanding the case to that court for the reinstatement of its consideration of Appellees' motion for attorney's fees. In so doing, we caution Appellants that any further efforts to prolong or continue proceedings in this court, including the filing of petitions for rehearing, will potentially expose them to the full panoply of penalties, sanctions, damages, and double costs pursuant to FRAP 38 at our disposal.

Id. at 2-3 (citing *Sharif v. Wellness Intl Network, Ltd.*, no. 07-10834, 2008 U.S. App. Lexis 7483, at *2 (5th Cir. April 8, 2008)). On remand the district court awarded WIN attorneys' fees in the amount of $655,596.13 as a sanction against the Debtor and his co-plaintiffs. *See* Order on Mot. for Civil Contempt, Civil Action No. 3:05-CV-01367-B, dkt. no. 180 at p. 1, District Court for the Northern District of Texas, Dallas Division. The Debtor was served with post-judgment discovery and document requests. *Id.* The Debtor never complied with WIN's discovery requests. *Id.*

WIN filed a Motion to Compel post-judgment discovery on October 13, 2008; the motion was granted on November 19, 2008; the Texas district court ordered the Debtor to respond to outstanding discovery requests. *Id.* at 1-2. Despite the district court's order compelling the Debtor to comply with

discovery requests, the Debtor did not respond to such requests nor did he appear for his deposition. *Id.*

On December 4, 2008, WIN filed a Motion for Civil Contempt against the Debtor for violating the Texas court's order on the Motion to Compel. *Id.* At a show cause hearing on January 13, 2009, at which the Debtor did not appear, the Texas court found clear and convincing evidence that he had violated several court orders compelling him to comply with outstanding discovery requests and the order to appear at the January 13, 2009 show cause hearing. *Id.* at 3. On February 10, 2009 the Texas court held the Debtor in civil contempt for discovery violations. He was ordered to respond to post-judgment discovery and to reimburse WIN for attorneys' fees and costs incurred to prepare and file the motion to compel and the motion for civil contempt. *Id.* at 3-5. On February 24, 2009, two weeks after the Texas court's contempt ruling, the Debtor filed the instant bankruptcy case.

On August 24, 2009, Wellness International Network, Ltd., Ralph Oats and Cathy Oats ("the WIN Plaintiffs") filed adversary proceeding 09-00770 asking the court to deny Debtor a discharge pursuant to 11 U.S.C. § 727. Count I of the amended adversary complaint, 09-00770, dkt. no. 10, alleges in part that "Debtor has continuously concealed property that he admitted under penalty of perjury that he owned by claiming that such property is currently owned by the Soad Wattar Living Trust" in violation of 11 U.S.C. § 727(a)(2)(A). Am. Compl. ¶ 20. The WIN Plaintiffs also allege that the Debtor was the Trustee of the Soad Wattar Trust, exercised complete control over the trust, and held out the assets

of the trust as his own. Am. Compl., ¶ 21.

Count II alleges in part that "the Debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information" in violation of 11 U.S.C. § 727(a)(3). *Id.* at ¶¶ 24-25.

Count III alleges in part that the "Debtor knowingly and fraudulently, in or in connection with the case made a false oath or account" in violation of 11 U.S.C. § 727(a)(4)(A). Am. Compl., ¶ ¶ 27-28. Specifically, the WIN Plaintiffs assert that the Debtor failed to disclose companies in which he was an officer within the past 6 years despite the fact that the bankruptcy petition requires the Debtor to disclose all businesses in which he was an officer, director, partner or managing executive of a corporation during the past 6 years. The Debtor did not disclose any businesses in response to this query. *See* Statement of Financial Affairs ("SOFA"), Voluntary Chapter 7 Bankruptcy Petition (the "Petition"), Case No. 09 B 05868, dkt. no. 1 at p. 29, ¶ 18.

Count IV alleges that the Debtor failed to explain the loss of $5 million in assets that he claimed to own in a 2002 Washington Mutual Bank, N.A. Loan Application (the "Loan Application") in violation of 11 U.S.C. § 727(a)(5). Am. Compl., ¶ 32. The assets listed in the Loan Application included the following: (1) Logan Square MRI Center; (2) Sharif Pharmacy; (3) Hermosa Medical Center; (4) three Banco Popular Accounts containing $90,000, $40,000 and $50,000, respectively; (5) $1,400,000 in a 401(k) retirement fund; and (6) $1,400,000 in real estate (collectively, the "Loan Application assets"). *See* Loan Application, Adversary Proceeding 09-00770, dkt. no. 17-1. The Debtor later claimed at his 2004

examination that he did not own any of the property that he claimed to own in the Loan Application. May 13, 2010 Transcript of Debtor's 2004 Examination, Adversary Proceeding 09-00770, Ex. 59 at 60-61. He has failed to explain the loss or disposition of the $5 million of assets in issue.

Count V seeks a declaratory judgment that the Soad Wattar Trust is the *alter ego* of the Debtor because the Debtor exercises complete control over the trust, resulting in the unity of interest between the Debtor and the trust such that separate personalities do not exist. Count V also alleges that to the extent that the Loan Application assets have been transferred into the trust, the trust is organized and operated as a mere tool or business conduit of the Debtor. Am. Compl, ¶ 35.

On April 15, 2010, the WIN Plaintiffs filed a Motion for Sanctions, Costs and Fees, and in the alternative, a Motion to Compel, Motion for Costs and Fees, and Motion to Modify Scheduling Order (hereinafter the "Sanctions Motion"), Adversary Proceeding 09-00770, dkt. no. 39. The court held a hearing on the Sanctions Motion on April 21, 2010. The WIN Plaintiffs argued that the Debtor had failed to comply with discovery requests and missed discovery deadlines for document production and responding to interrogatories. On April 21, 2010 an order was entered compelling the Debtor to comply with all outstanding discovery by April 28, 2010 or risk an order of default being entered against him. The hearing on the Sanctions Motion was continued to April 28, 2010.

On April 28, 2010, the WIN Plaintiffs reported that the Debtor had produced some documents along

with certain interrogatory responses on the afternoon of April 27, 2010. The hearing was continued to May 24, 2010 to allow the WIN Plaintiffs time to assess whether the Debtor's document production and interrogatory responses were in compliance with the April 21, 2010 order compelling the Debtor to comply with all outstanding discovery requests. At the hearing on May 24, 2010, the WIN Plaintiffs proved that the Debtor had not fully complied with discovery requests and should be sanctioned. *See* May 24, 2010 Transcript of Sanctions Hearing, *Wellness International, Ralph Oats and Kathy Oats v. Richard Sharif, Individually and as Trustee of the Soad Wattar Trust*, Adversary Proceeding 09-00770, dkt. no. 99 at 4 ("May 24, 2010 Hearing Transcript").

II. Debtor Failed to Sign or Verify His Interrogatory Responses

Federal Rule of Civil Procedure 33(b), applicable to this adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7033, requires in relevant part that:

> (1) ... [I]nterrogatories must be answered:
>
> (A) by the party to whom they are directed; or
>
> (B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.
>
> (3) ... Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under

> oath.
> (5) ... The person who makes the answers must sign them, and the attorney who objects must sign any objections.

Fed. R. Civ. P. 33(b)(1),(3) and (5). The Seventh Circuit Court of Appeals and the United States District Court for the Northern District of Illinois have determined that under Rule 33, answers to interrogatories must be verified and signed by the person answering the interrogatory, not only by the party's attorney. *See, e.g., Hindmon v. Natl.-Ben Franklin Life Ins. Corp.*, 677 F.2d 617, 619 (7th Cir.1982) (observing that interrogatory answers signed by an attorney and not the party violated "the clear mandate of Federal Rule of Civil Procedure 33(a)"); *accord Overton v. City of Harvey*, 29 F.Supp.2d 894, 901 (N.D.I11.1998) (striking as summary judgment exhibit plaintiff's unverified answers to interrogatories signed only by attorney).

The Debtor's interrogatory responses as Trustee of the Soad Wattar Trust were signed by the Debtor, however, they were not made under oath. *See* May 24, 2010 Hearing Transcript at 6; Richard Sharif's Answers to Interrogatories as Trustee of the Soad Wattar Revocable Living Trust, Hearing Ex. No. 3 at p. 9 ("Sharif Trustee Interrog. Answers"). Similarly, the Debtor's individual interrogatory responses, which were signed by Debtor's attorney, were not answered under oath. *See* Richard Sharif's Answers to Plaintiffs' First Request for Interrogatories, May 24, 2010 Hearing Transcript, Ex. No. 4 at 9 ("Sharif Individual Interrog. Answers"); May 24, 2010 Hearing Transcript at 6. Those responses should have been signed under oath by the Debtor as required by Fed. R. Civ. P. 33(b).

The Debtor was not present at the hearing; his attorney did not explain why the interrogatory responses were not signed under oath as required.

III. Debtor's Failure to Provide Documents Requested by the WIN Plaintiffs and the Bankruptcy Trustee

The WIN Plaintiffs asserted that the Debtor repeatedly failed to produce numerous documents requested by them in requests for production and by the Trustee at the section 341 creditors meeting ("creditors meeting"), despite this court's April 21, 2010 order compelling the Debtor to comply with all outstanding discovery requests.

1. Washington Mutual Loan Application and Related Documents

During the Debtor's initial creditors meeting ("creditors meeting") on March 25, 2009, the WIN Plaintiffs and the Bankruptcy Trustee requested that the Debtor provide documents relating to the Loan Application assets that he claimed were his. The creditors meeting was continued to April 21, 2009 to allow the Debtor additional time to gather documents related to the Loan Application assets. *See* Sanctions Motion at p. 5, 09 B 05868, Adversary Proceeding 09-00770, dkt. no. 38, p. 7 ("Sanctions Motion"). When the Debtor appeared at the continued creditors meeting he did not provide the Bankruptcy Trustee or the WIN Plaintiffs with the requested documents; he asserted that none of the Loan Application assets belonged to him. *Id.* The Debtor asserted that the Soad Wattar Trust owned all of the Loan Application assets, that he was the Trustee of the trust, and that he lied when he represented that he owned those assets. *Id.*

Pursuant to Federal Rule of Bankruptcy Procedure 2004, on motion of any party in interest, the court may order the examination of any entity. At a Rule 2004 examination ("2004 examination") of the Debtor, he confirmed under oath that he testified at the section 341 creditors meeting that he lied in the Loan Application:

> Q: The third sentence [of Debtor's answer to the Amended Adversary Complaint states], defendant testified at the 341 meeting that he lied on the loan application, that he did not own any of the real estate listed in the loan application, and that this property is owned by Soad Wattar Trust, his mother or sister. Do you see that statement? I'd be glad to orient you if you --
>
> A: Yeah. Is that by the Answer, defendant admits?
> Q: Uh huh.
> A: Yeah. That on April '09 – okay.
> Q: Is that a true statement?
> A: Yes, yeah.

May 13, 2010 Rule 2004 Examination of Richard Sharif, *Wellness International, Ralph Oats, and Cathy Oats v. Richard Sharif, Individually and as Trustee of the Soad Wattar Trust*, Adversary Proceeding 09-00770, Ex. No. 59 at 60-61 ("Transcript of Debtor's 2004 Examination"). *See* also Defendant's Answer to Amended Complaint, dkt. no. 23, p. 8, 09 B 05868, Adversary Proceeding 09-00770.

Based upon the Debtor's assertion that the Soad Wattar Trust owned the assets listed in the Loan Application, the WIN Plaintiffs and the Bankruptcy

Trustee requested documents relating to the formation and funding of the trust and documents evidencing ownership or transfer of the Loan Application assets. *See* Sanctions Motion at p. 7. The creditors meeting was continued to June 3, 2009 to give the Debtor time to provide the requested documents. At the June 3, 2009 creditors meeting the Debtor failed to provide any of the requested documents. Sanctions Motion at p. 7.

Subsequent to the Debtor's refusal to provide the documents at his second and third creditors meetings, the Debtor brought a Motion for Protective Order requesting that he be granted leave to tender documents relating to the Loan Application and the Soad Wattar Trust under a protective order to prevent disclosure of information to the Debtor's creditors and their attorneys. *See* 09 B 05868, dkt. no. 23. The Debtor's Motion for Protective Order was denied on June 11, 2009. *See* 09 B 05868, dkt. no. 25. Despite this court's denial of Debtor's Motion for Protective Order, he never tendered any documents relating to the Loan Application assets, prompting the Bankruptcy Trustee to file a Motion for Turnover of Documents from Richard Sharif to Horace Fox, Jr. on October 20, 2009. *See* 09 B 05868, dkt. no. 40. The court granted that motion on October 27, 2009 (09 B 05868, dkt. no. 42). To date the Debtor has failed to comply with this court's order to turn over the required documents to Horace Fox, Jr., the trustee of his bankruptcy estate. *See* Sanctions Motion at p. 6.

The WIN Plaintiffs filed a document request seeking the Loan Application assets. *See* Richard Sharif's Response to Plaintiffs' First Request for Production of Documents, Hearing Ex. No. 1, ¶¶ 15-

22 ("Sharif Production Responses"). The Debtor failed to produce documents relating to the Loan Application assets.

2. Richard Sharif Revocable Trust Documents

The WIN Plaintiffs asserted that the Debtor failed to disclose information and documents relating to the Richard Sharif Revocable Trust despite interrogatory and production requests requiring him to do so.

The Debtor listed the Richard Sharif Revocable Trust in his Petition as property owned by another person that he controls. *See* Statement of Financial Affairs, ("SOFA") 09 B 05868, dkt. no. 1, p. 27. Based on this disclosure, the WIN Plaintiffs' interrogatories requested that the Debtor identify each trust for the benefit of others that the Debtor created or contributed to in the last five years. *See* Richard Sharif's Answers to Plaintiffs' First Request for Interrogatories, May 24, 2010 Hearing Ex. 4, pp. 8-9, ¶ 11; Richard Sharif's Response as Trustee to Plaintiffs' First Request for Production of Documents, May 24, 2010 Hearing Transcript, Ex. No. 2 at p. 2, ¶ 11 ("Sharif Trustee Production Responses"). The Debtor responded to the interrogatory with the answer "none," which is wholly inconsistent with the Debtor's SOFA disclosure of the Richard Sharif Revocable Trust on page 27 and his admission that he was the Trustee of the Soad Wattar Revocable Living Trust of 1992. *See* Sharif Individual Interrog. Answers at p. 8, ¶ 11; May 24, 2010 Hearing Transcript at 9; SOFA, ¶ 14.

The WIN Plaintiffs also requested that the Debtor produce all documents referencing or evi-

dencing any assets held in trust in which the Debtor claims or has an interest. Sharif Production Responses at ¶ 42 and Sharif Trustee Production Responses at ¶ 42. Again, despite Debtor's acknowledgment of having an interest in the Richard Sharif Revocable Trust in his sworn bankruptcy schedules (*See* SOFA at p. 27), the Debtor failed to produce any documents relating to the trust. May 24, 2010 Hearing Transcript at 9-11.

3. Bank Statements and Financial Records

The WIN Plaintiffs asserted that the Debtor failed to produce bank statements and account records relating to financial transactions involving Richard Sharif individually and the Soad Wattar Trust. The Plaintiffs requested that the Debtor produce documents evidencing any account at a financial institution in which the Debtor is a designated signatory. Sharif Trustee Production Responses at p. 7, ¶ 44; Sharif Production Responses at p. 7-8, ¶ 44. The Debtor failed to produce any documents responsive to these requests and instead listed the names and addresses of three financial institutions with corresponding account numbers. *See* Sharif Production Responses at p. 7, ¶ 44; Sharif Trustee Production Responses at p. 7, ¶ 44; May 24, 2010 Hearing Transcript at 11.

The WIN Plaintiffs also requested that the Debtor produce documents relating to any checking, savings, money market, passbook, demand deposit, negotiable order of withdrawal or trust account in which the Debtor had any interest. Sharif Trustee Production Responses at p. 8, ¶ 49; Sharif Production Responses at p. 8, ¶ 49. The Debtor failed to

produce any documents responsive to this request, even though he had a personal account with JP Morgan Chase Bank. He acknowledged his lack of compliance during his 2004 examination. Transcript of Debtor's 2004 Examination at 166. May 24, 2010 Hearing Transcript at 11-12.

During their investigation, the WIN Plaintiffs independently discovered numerous documents that the Debtor failed to produce relating to assets held at A.G. Edwards in which the Debtor had an interest. The WIN Plaintiffs discovered account statements from A.G. Edwards for September and October of 2003 in the name of Soad Wattar, the Debtor's mother, and Richard Sharif as joint tenants. A.G. Edwards & Sons, Inc. Account Statements, Ex. No. 61 to 2004 Examination of Debtor ("A.G. Statements"). These account statements revealed that approximately $752,050 in assets were held in joint tenancy by Soad Wattar and Richard Sharif. *See* A.G. Edwards Statements. In his Rule 2004 examination the Debtor admitted that while he had documents relating to this A.G. Edwards account, he did not produce them. Transcript of Debtor's 2004 Examination at 172-173. The Debtor also stated that the assets in this A.G. Edwards account were transferred to Wachovia Bank, but the Debtor failed to produce any transfer documents. Transcript of Debtor's 2004 Examination at 174-176. The Debtor also failed to disclose the A.G. Edwards accounts in his bankruptcy petition. *See* Petition, dkt. no. 1, pp. 9-13, Schedule C of Personal Property and Schedule D of Property Claimed as Exempt.

The WIN Plaintiffs discovered a TransAmerica Triple Advantage VA variable annuity held at A.G. Edwards for the benefit of the Debtor and his sister,

Ragda Sharifeh, as joint tenants, with a valuation of $39,248. May 24, 2010 Hearing Transcript at 22-23. Once again, the Debtor failed to provide information relating to this annuity despite receiving interrogatories and document requests requiring him to do so. May 24, 2010 Hearing Transcript at 22. At his 2004 examination the Debtor was unable to say where that money went. Transcript of Debtor's 2004 Examination at 178-179.

The WIN Plaintiffs estimate that approximately $912,000 in assets were held at A.G. Edwards for the benefit of the Debtor individually or jointly with his mother or his sister, yet the Debtor provided no information or documentation regarding the A.G. Edwards accounts. May 24, 2010 Hearing Transcript at 24.

The Debtor also failed to provide information or documentation evidencing other accounts that he admitted to having an interest in at his 2004 examination. May 24, 2010 Hearing Transcript at 26-31. The Debtor admitted the existence of a Soad Wattar Trust account at Banco Popular. During his 2004 examination, he admitted his failure to produce documents about various accounts:

1) Q: Sir, I'm just asking. You have not given me one single account statement for the trust [at Banco Popular], have you?
   A: Account statement?
   Q: Yes.
   A: You mean, from like the investment firm?
   Q: Yes.
   A: There are boxes available. These

are, you know --
Q: You have not provided us a single account statement, have you?
A: I did not. Again, I did not know that you needed that one. If not, it's available. You have that.

2) Q: Where are there accounts besides Banco Popular?
A: Banco Popular, absolutely, and whatever you need from Wells Fargo, I'll provide you with it.
Q: I'm just asking for the names of the companies — Wells Fargo and who else?
A: Wells Fargo, Wachovia, which is now Wells Fargo, has a mortgage payment for the house because it comes out of the mother's living trust every month. This is two – three. What else?
Q: Any investment firms like Smith Barney or Morgan Stanley? I'm just throwing out people that I can think of.
A: There is one she [Debtor's mother] has an account with Raymond James, since 2005, one account. I just remembered this. I believe that's all I know right now.

Transcript of Debtor's 2004 Examination at pp. 107-109.

3) Q: I'm not asking how much you use it. I'm asking why have you not produced to me the JP Morgan Chase account statements as requested in discovery?
A: Counsel, I did list the only account

> that I have. I'm sorry if I didn't produce the statement available. I know there's a question, Counselor, that I need to reproduce because my lawyer would have told me to produce it. I went by the name of the bank and my account but –

Transcript of Debtor's 2004 Examination at 143-144.

4. Conveyance, Disposal, or Transfer of Asset Documents

The WIN Plaintiffs asserted that the Debtor failed to provide information relating to the conveyance, disposal, or transfer of certain assets in which the Debtor once claimed an interest. At his 2004 examination the Debtor admitted that he once owned a 10% interest in the Logan Square MRI & Diagnostic Center, Inc. ("Logan Square") and that he had relinquished it. *See* Transcript of Debtor's 2004 Examination at 96. However, the Debtor never provided information or documentation evidencing the disposition of his interest in Logan Square; he admitted this at the 2004 examination despite having received the WIN Plaintiffs' interrogatories and requests for production inquiring about the disposition of his interest in Logan Square. *See* Transcript of Debtor's 2004 Examination at 96.

At that 2004 examination the Debtor denied ever having an ownership interest in Sharif Pharmacy (Transcript of Debtor's 2004 Examination at 61). However, the Debtor represented in a 2002 Internal Revenue Service income tax return that he was the 100% owner of Sharif Pharmacy. *See* Transcript of Debtor's 2004 Examination at 68. After the Debtor was confronted with the inconsistency between his

testimony and his 2002 income tax return, he testified that he does not examine his tax returns because his accountant does and that he does not understand them. *Id.* at 69. The Debtor testified that he held a 10% ownership interest in Sharif Pharmacy and that the 100% figure listed on his tax return was an error. *Id.* at 68. Whether the Debtor's ownership interest in Sharif Pharmacy was 10%, 100%, or zero as testified to on page 61 of his 2004 examination, he admitted at his 2004 examination that he produced no documentation evidencing the transfer of stock in Sharif Pharmacy, acknowledging his failure to comply with his obligation to disclose information about his financial affairs. *See* Transcript of Debtor's 2004 Examination at 72. The Debtor also admitted that he asked the office manager of Sharif Pharmacy for responsive documents from 1992 through the present but did not undertake other efforts to obtain those documents. *Id.* at 86-87.

5. Corporate Records

The WIN Plaintiffs asserted that the Debtor failed to produce corporate records for Sharif Pharmacy and Hermosa Medical Center after 2006. The WIN Plaintiffs' discovery requests specifically designated corporate records for Sharif Pharmacy and Hermosa Medical Center as documents for production. The Debtor never produced the requested documents even after this court's April 21, 2010 order compelling the Debtor's compliance with all outstanding discovery requests. May 24, 2010 Hearing Transcript at 34-37.

6. Documents Evidencing the Formation and Funding of the Soad Wattar Trust

The WIN Plaintiffs asserted that the Debtor failed to produce documents relating to the formation and funding of the Soad Wattar Trust. May 24, 2010 Hearing Transcript at 38. The WIN Plaintiffs argued that these documents are critical because the Debtor testified that the assets he once claimed as his own were actually assets of the trust.

The requests for production required the Debtor to produce documents establishing and funding the Soad Wattar Trust, evidencing the transfers of assets into the trust, and all other documents related to assets held in the trust. *See* Sharif Trustee Production Responses, Hearing Ex. No. 2 at ¶¶ 27, 45-46, 49-50; May 24, 2010 Hearing Transcript at 38-41. The WIN Plaintiffs specifically requested all deeds, records, titles, or other documents that related to assets in the name of the Soad Wattar Trust from 2002 to the present. Debtor alleges that the Trust was funded with a $2,000,000 inheritance from his deceased father that came from an international wire transfer from Beirut, Lebanon through a financial entity in Dubai. Transcript of Debtor's 2004 Examination at 109. However, the Debtor also admitted that he did not have any of the documents evidencing the wire transfers in his possession and that he had not produced such documents to the WIN Plaintiffs. Transcript of Debtor's 2004 Examination at 109-111. The Debtor also admitted that except for one asset, the Revere house, he failed to produce any documents showing transfers of assets into the Soad Wattar Trust from 1992 to the present. *See id.* at 104-105. The Debtor has failed to produce documen-

tation relating to the formation and funding of the Soad Wattar Trust.

The WIN Plaintiffs also requested the 1992 trust instrument that established the Soad Wattar Trust. The Debtor admitted at his 2004 examination that he failed to produce the original trust instrument. Transcript of Debtor's 2004 Examination at 101.

A review of the Debtor's Statement of Financial Affairs reveals that he did not disclose that he was the Trustee of the Soad Wattar Trust. *See* SOFA, at ¶ 14, where only the Richard Sharif Revocable Trust was disclosed.

7. Signed Tax Returns and Documents Used to Prepare Debtor's Tax Returns

The WIN Plaintiffs asserted that the Debtor failed to produce signed tax returns or any of the underlying source documents used to prepare such tax returns. May 24, 2010 Hearing Transcript at 44. While the WIN Plaintiffs did receive some federal and state tax returns from 2003-2008 from the Debtor, none of the returns received was signed. *See* May 24, 2010 Hearing Transcript at 44; Sharif Production Responses at ¶ 10 and Sharif Trustee Production Responses at ¶ 10. When the Debtor was questioned about the unsigned tax returns at his 2004 examination, he stated that he was 100% sure that the tax returns that went to the government were signed, but he did not produce any signed tax returns to the WIN Plaintiffs. *See* Transcript of Debtor's 2004 Examination at 130-131. The Debtor also stated that he did not attempt to obtain signed tax returns from the IRS. *Id.* at 130.

The Debtor also failed to produce the source

documents used to prepare his tax returns and admitted the same at his 2004 examination. *See id.* at 135.

8. Documents Evidencing Debts Owed to Debtor's Family Members

The WIN Plaintiffs asserted that the Debtor failed to produce any documents underlying the debts that he owes to his family members. *See* Sharif Production Responses & Sharif Trustee Production Responses at ¶¶ 34-37; May 24, 2010 Hearing Transcript at 54. The Debtor's bankruptcy petition disclosed several debts owed to family members including the following: (1) $49,000 to Haifa Kaj, Debtor's sister; (2) $39,000 to Jamal Sharif, Debtor's brother; (3) $93,000 to Ragda Sharifeh, Debtor's sister; and (4) $90,000 to Soad Wattar, Debtor's mother. *See* Petition at dkt. no. 1, Schedule F, p. 17; May 24, 2010 Hearing Transcript at 55. Based on these disclosures in the Debtor's Schedule F, the WIN Plaintiffs requested that the Debtor produce documents referencing or evidencing debts owed to the above family members. *See* Sharif Production Responses, May 24, 2010 Hearing Ex. No. 1 at ¶¶ 34-37; Sharif Trustee Production Responses, Hearing Ex. No. 2 at ¶¶ 34-37. The Debtor failed to produce any documents evidencing the debts he owes to his relatives and asserted that those debts were based on oral agreements. May 24, 2010 Hearing Transcript at 56. The WIN Plaintiffs contend, and the court agrees, that it is hard to believe that $271,000 was transferred as loans to the Debtor without documents such as wire transfer forms, bank statements, canceled checks, emails or enclosure letters being created.

IV. Debtor's Response

In response to the WIN Plaintiffs' assertions regarding the Debtor's noncompliance, the Debtor's attorney argued that while there may be some deficiencies in the Debtor's discovery responses, the Debtor made a good faith effort to comply with all discovery requests. May 24, 2010 Hearing Transcript at 75-76. Debtor's attorney pointed out that the Debtor was initially unable to meet the discovery deadlines because he was in Syria attending to his ill mother who subsequently passed away. May 24, 2010 Hearing Transcript at 68. When the court requested proof of the Debtor's whereabouts the Debtor's attorney produced airline tickets to Syria and a copy of the mother's death certificate. *Id.* This court does not believe, however, that the Debtor made a serious effort to comply with the WIN Plaintiffs' discovery requests both before and after his mother's death.

The Debtor's attorney argued that the WIN Plaintiffs' counsel never called him to object to the sufficiency of the discovery responses before filing the Sanctions Motion. May 24, 2010 Hearing Transcript at 68-69. According to him, the WIN Plaintiffs supplement to their Sanctions Motion did not contain the statement required by Northern District of Illinois Local Rule 37.2 certifying that the movant consulted with opposing counsel regarding the discovery defects before filing a motion pursuant to Federal Rule of Civil Procedure 26. May 24, 2010 Hearing Transcript at 77-78. This court notes that a phone call would have been futile because the Debtor was so grossly out of compliance with his discovery obligations. The court notes that the attorney for the WIN Plaintiffs may have complied with Local

Rule 37.2 as their Sanctions Motion includes a certification that he conferred with the Debtor's attorney about the relief sought in the Sanctions Motion before it was filed. Sanctions Motion at p. 14. The Debtor's counsel's complaint in this regard lacks specificity regarding which pleading lacks the required certification/statement of conference/consultation.

The Debtor's attorney asserted that he produced additional documents after the Debtor's 2004 examination when he surmised, based on the questions that were posed to the Debtor, that the WIN Plaintiffs wanted more documents. The Debtor's attorney took it upon himself to produce bank statements from several financial institutions relating to the Soad Wattar Trust, the Debtor's personal bank accounts and the Sharif Pharmacy. May 24, 2010 Hearing Transcript at 70-71. He did not state which documents were produced after the 2004 examination. The court has no idea what was contained in the late production, or whether those documents were responsive to the WIN Plaintiffs' requests and why they were not produced sooner. The court notes that the Debtor's 2004 examination took place on May 13, 2010; any documents produced by Debtor's attorney after that date were well outside of the April 28, 2010 deadline that the court set for the Debtor to comply with all outstanding discovery requests, preventing the WIN Plaintiffs from questioning the Debtor about those documents at his 2004 examination.

V. Ragda Sharifeh's Involvement With The Bankruptcy Case and The Adversary Proceeding Before The Entry of The July 6, 2010 Order

Ragda Sherifeh testified at a deposition herein on June 10, 2010 that her brother, Richard Sharif, the Debtor, acted as her agent in the litigation in the Northern District of Texas. Transcript of June 10, 2010 Deposition of Ragda Sharifeh ("Ragda Sharifeh Depostion"), 09 B 05868, dkt. no. 78, Exhibit A, pp. 47-48. She directed the Debtor to file the litigation, instructed him on how to proceed with the litigation, and instructed him to represent to third parties that he owned the Loan Application assets.

At page 95 of the Deposition, Ragda Sharifeh testified about telling the Debtor to use property to buy a house for their mom:

> Q: And again, it's checked self-employed. Were you aware that Richard represented to Washington Mutual Bank that he, as self-employed, owned Logan Square MRI Center, Sharif Pharmacy, and Hermosa Medical Center?
>
> A: What I told him is to use the home address, the clinic address, in order to secure the amount of money to be used to buy the house for mom.

At page 96 of the Deposition, Ragda Sharifeh testified that the assets were being held out by the Debtor as his own although he was not the owner of them:

> Q: So did you know that these assets,

> the company's and the real estate, were being held out by Richard as representing that he owned all of them? He was representing to the bank that he owned the real estate and the business?
>
> A: He is, he is not the owner. Otherwise his ex-wife would have cleaned him out, but I told him that he could make that statement.

VI. Prior Opportunities for Ragda Sharifeh to Intervene

Before this court resumed the hearing of the WIN Plaintiffs' Sanctions Motion on May 24, 2010, ten days earlier on May 14, 2010, Ragda Sharifeh filed a motion herein seeking sanctions against the WIN Plaintiffs regarding a subpoena. Adversary Proceeding 09-00770, dkt. no. 56. By seeking sanctions at that time, she had an opportunity to review the docket and discern that her agent and brother, Debtor Richard Sharif, was being challenged for failing to disclose information regarding the trust that she now claims to be involved with as both a successor beneficiary and as a successor trustee. A review of the Amended Complaint would have revealed that the trust assets were being sought by the WIN Plaintiffs.

Ragda Sherifeh, who *now* wants to intervene to protect her interests, could have sought to intervene before the court entered the July 6, 2010 order. She could have asserted the claims she now asserts in Adversary Proceeding 10-02239 in this bankruptcy case before Adversary Proceeding 09-00770 was adjudicated. Perhaps, she could have provided the requested information, especially the information re-

garding the formation and funding of the Soad Wattar Trust. She was on notice that the WIN Plaintiffs were seeking to have the trust declared to be the Debtor's *alter ego*, as that request was made in Count V of the Amended Adversary Complaint, which had been of record since it was filed on November 3, 2009. Adversary Proceeding 09-00770, dkt. no. 10. The WIN Plaintiffs filed the Sanctions Motion on April 15, 2010 regarding Richard Sharif s discovery failures. Adversary Proceeding 09-00770, dkt. no. 38. She should have known as of May 14, 2010 that the trust assets were at risk due to the Debtor's refusal to provide the requested information.

Ragda Sharifeh was scheduled as a creditor herein on the Debtor's Schedule F as an unsecured nonpriority creditor when he filed for bankruptcy relief on February 24, 2009. 09 B 05868, dkt. no.1, Schedule F, p.17. According to a Certificate of Service dated February 28, 2009, she was sent notice of the filing of this bankruptcy case. 09 B 05868, dkt. no. 9, p. 3.

In the motion to intervene, Ragda Sharifeh represents that she and other relatives owned the property that Debtor Richard Sharif represented as his own in the 2002 Loan Application. Petition to Intervene on Behalf of the Soad Wattar Revocable Living Trust of 1992 and Ragda Sharifeh ("Petition to Intervene"), dkt. no. 68, 09 B 05868, p. 4. The court will not give any credence to these unsupported assertions. They are the issues that the WIN Plaintiffs and the Bankruptcy Trustee sought to explore through various discovery requests, which were generally ignored by the Debtor. It would be unfair to give any weight to Ragda Sharifeh's unsupported

factual allegations in this regard at this point.

Ragdah Sharifeh also states in the Petition to Intervene that during her lifetime their mother was the beneficiary of the Soad Wattar Trust and that upon her death in 2010, she became the successor beneficiary of that trust. The WIN Plaintiffs requested but never received the documents and records regarding the formation, operation and funding of the trust, and Ragda Sharifeh did not testify at the January 19, 2011 hearing on her Motion to Intervene in support of her assertion that she is the successor beneficiary of the Soad Wattar Trust. This paucity of information due to incomplete disclosures and her failure to testify leaves the court without any facts regarding her status as a successor beneficiary. While this issue was in dispute her agent, the Debtor, Richard Sharif, did not provide relevant information about it, which he was obligated to disclose as a debtor seeking a Chapter 7 discharge.

Ragda Sharifeh complains that she and her sister, Hafi Kaji, were not named as parties in any of Richard Sharif s bankruptcy proceedings. She does not cite any authority in support of this suggestion that they were necessary parties herein.

Under the Illinois Trusts and Trustees Act, trustees, not beneficiaries, are vested with the power to pursue "claims in favor or against the trust estate." The trustee has the power to "compromise, contest, prosecute or abandon claims or other charges in favor of or against the trust estate." *In re Schneider*, 417 B.R. 907, 913 (Bankr. N.D. Ill. 2009); 760 ILCS 5/4.11. The trustee, not the beneficiaries, has the exclusive authority to sue third parties who injure the beneficiaries' interest in the trust and is the

proper party to be sued on behalf of a trust. *Godfrey v. Kamin*, 2000 U.S. Dist. LEXIS 18213, 13-14 (N.D. Ill. Dec. 13, 2000). Ragda Sharifeh seeks to intervene as a successor beneficiary, however, beneficiaries can not act on behalf of a trust. As a purported beneficiary she probably has no standing to pursue the relief she requests herein. The trust has to be represented by its trustee, not its beneficiary.

Ragda Sharifeh asks to intervene herein pursuant to Federal Rule of Bankruptcy Procedure 2018(a) which provides: "(a) Permissive Intervention. In a case under the Code, after hearing on such notice as the court directs and for cause shown, the court may permit any interested entity to intervene generally or with respect to any specified matter." This Rule is not applicable as it applies to intervention in a bankruptcy case under the Code. She has sought leave to intervene as to the July 6, 2010 and August 5, 2010 orders entered in the Adversary Proceeding. Intervention in Adversary Proceedings is covered by Federal Rule of Bankruptcy Procedure 7024. Federal Rule of Bankruptcy Procedure 7024 provides that Federal Rule of Civil Procedure 24 applies in adversary proceedings. Federal Rule of Civil Procedure 24 provides:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> > (1) is given an unconditional right to intervene by a federal statute; or
> >
> > (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action

> may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
>
> (b) Permissive Intervention.
>
> (1) In General. On timely motion, the court may permit anyone to intervene who:
>
> (A) is given a conditional right to intervene by a federal statute; or
>
> (B) has a claim or defense that shares with the main action a common question of law or fact.

Federal Rule of Civil Procedure 24(a) and (b).

Subsection (b)(3) of that Rule states: "Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights."

Federal Rule of Civil Procedure 24(b)(3).

Ragda Sharifeh, individually, as a purported successor beneficiary and as a purported successor trustee has not acted timely in pursuing intervention. She was involved in the bankruptcy case since it was filed; the Certificate of Notice shows that she was sent notice of the filing of the case on February 28, 2009. She was subpoenaed as a witness in the Adversary Proceeding on March 10, 2010, Adversary Proceeding 09-00770, dkt. no. 25. Her motion re-

garding the propriety of the service of a subpoena was filed on May 14, 2010, dkt. no. 56, ten days before the final hearing at which the court heard arguments on the WIN Plaintiffs' Motion for Sanctions. Instead of filing the Motion to Intervene before this adversary proceeding was resolved by this court on July 6, 2010, she sought leave to intervene herein on December 3, 2010, five months after the entry of the final order adjudicating Adversary Proceeding 09-00770.

The movant's request to intervene relies unsoundly on the Seventh Circuit's discussion of section 1109(b) of the Bankruptcy Code in *In re Wilson*, 965 F.2d 160, 169 (7th Cir. 1992) in the context of a chapter 11 case. Section 1109(b) states "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue *in a case under this chapter*." 11 U.S.C. § 1109(b). (emphasis added). Section 1109(b), by its own terms, does not apply to this chapter 7 bankruptcy case, it applies to chapter 11 cases.

VII. Ragda Sharifeh May Not Be a Successor Trustee

Ragda Sharifeh failed to produce any evidence that she is the successor trustee of the Soad Wattar Trust. While lacking in factual basis, her allegations that she became a successor trustee on July 21, 2010 reveals that this assertion has no legal basis. Paragraph 14 of her Motion to Intervene alleges that shortly after a temporary restraining order was entered by a state court judge on July 21, 2010 in a

Chancery Division lawsuit that she filed on July 15, 2010, Richard Sharif resigned as the Trustee of the Soad Wattar Trust.[1] As of July 6, 2010, however, the trust no longer existed. The trust's assets became property of the Debtor's estate as of the commencement of the bankruptcy case once the July 6, 2010 order was entered declaring the trust to be the Debtor's *alter ego*. In *In re Sklarin*, 69 B.R. 949, 954 (Bankr. S.D. Fla. 1987), the court ruled that "[it] is well established that property of the Debtor in the possession, custody and control of its alter ego comprises property of the estate at the commencement of the case, and that bankruptcy courts have the power to disregard separate corporate entities so as to reach the assets of its non-debtor alter ego to satisfy debts of the Debtor." (quoting *In re F & C Services, Inc.*, 44 B.R. 863, 868 (S.D. Fla. 1984)).

CONCLUSION

Movant Ragda Sharifeh could have sought leave to intervene herein before this matter was adjudicated on July 6, 2010 but failed to do so. She knew

---

[1] Ragda Sharifeh and Haifa Kaj sued Richard Sharif in state court after this court found that the Soard Wattar Trust was his *alter ego*. They sought, amongst other things, a declaration that Ragda Sharifeh was the successor beneficiary of the Soad Wattar Trust, and an injunction requiring Richard Sharif to transfer all Soad Wattar Trust assets to Ragda Sharifeh and enjoining him from transferring assets in the Soad Wattar Trust to any of his creditors who filed claims against him in his bankruptcy case. *See Ragda Sharifeh and Haifa Kaj v. Richard Sharif*, 10 CH 30432, filed on July 15, 2010 in the Circuit Court of Cook County, Illinois. However, the temporary restraining order entered in state court may have restrained nothing, as the trust assets became part of the bankruptcy estate as of the date of bankruptcy filing. *See infra In re Sklarin*, 69 B.R. 949, 954 (Bankr. S.D. Fla. 1987).

of the bankruptcy case as a creditor; she was involved in the Adversary Proceeding as a witness. Pursuant to Federal Rule of Civil Procedure 24(b)(3) in exercising its discretion, the court finds that intervention would unduly delay and prejudice the adjudication of the original parties' rights.

Ragda Sharifeh's request to intervene herein regarding the July 6, 2010 and August 5, 2010 orders is DENIED.

Dated:
March 9, 2011

ENTERED:

s/Jacqueline P. Cox

Jacqueline P. Cox
United States Bankruptcy Judge

APPENDIX G

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS
EASTERN DIVISION**

RICHARD SHARIF, **Appellant,** **v.** **WELLNESS INTERNATIONAL NETWORK, LTD., RALPH OATS and CATHY OATS,** **Appellees.**	**Nos. 11 C 7374** **Hon. Harry D. Leinenweber**
RAGDA SHARIFEH, **Appellant,** **v.** **RICHARD SHARIF, *et al.*,** **Appellees.**	

ORDER

On July 1, 2014, the Supreme Court granted certiorari to address two issues raised by the Sev-

enth Circuit's decision affirming in part and reversing in part this Court's affirmance of the bankruptcy court's entry of judgment in this matter. Five motions remain pending in this Court: (1) the Trustee's application for a temporary restraining order and injunctive relief, (2) Richard Sharif's motion to withdraw the reference of adversary proceeding No. 12 A 430 pending appeal, (3) Ragda Sharifeh's motion for the release of funds and/or assets, (4) Ragda Sharifeh's motion to intervene, and (5) Ragda Sharifeh's motion to vacate the bankruptcy court's Order, dated August 5, 2010.

Having reviewed these motions, the Court concludes that the efficient course is to allow the parties to raise any arguments they may have as to these matters after the Supreme Court issues its ruling. Accordingly, the Court administratively denies the parties' motions without prejudice and with leave to refile such motions with supplemental briefing after the Supreme Court's decision. This resolves the motions pending at ECF Nos. 11, 55, 70, 80, and 89.

The matter is stayed pending decision by the Supreme Court. The parties shall submit a joint letter, no later than one week after the Supreme Court issues its decision, stating their positions as to how the case should proceed.

SO ORDERED.

Dated: 7/28/2014

s/Harry D. Leinenweber
HARRY D. LEINENWEBER
United States District Judge

AMICUS CURIAE BRIEF

No. 13-935

In the Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LIMITED, ET AL., PETITIONERS

v.

RICHARD SHARIF

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether, consistent with Article III of the United States Constitution and *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), a bankruptcy judge may enter final judgment on a request for a declaration that particular property in the debtor's possession is property of the estate under 11 U.S.C. 541.

2. Whether a litigant may consent to the entry of final judgment by a bankruptcy judge and thereby waive any constitutional right to have a claim adjudicated by an Article III court, and, if so, whether implied consent may suffice.

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In the Supreme Court of the United States

No. 13-935

WELLNESS INTERNATIONAL NETWORK, LIMITED, ET AL., PETITIONERS

v.

RICHARD SHARIF

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The United States has a substantial interest in this case because the Court's decision is likely to affect the allocation of authority between bankruptcy and district courts in the disposition of bankruptcy cases. United States Trustees—who are Department of Justice officials appointed by the Attorney General—are charged with supervising the administration of bankruptcy cases. See 28 U.S.C. 581-589a; see also 11 U.S.C. 307 ("The United States trustee may raise and may appear and be heard on any issue in any [bankruptcy] case or proceeding."). The United States also has an interest in defending the constitutionality of a statutory framework that, in certain instances, permits a bankruptcy

judge to enter final judgment "with the consent of all the parties to the proceeding." 28 U.S.C. 157(c)(2).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-25a.

STATEMENT

1. a. A person may commence a voluntary bankruptcy case by filing a petition in bankruptcy court. 11 U.S.C. 301(a). The filing of the petition creates a bankruptcy "estate" generally comprising "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. 541(a). The debtor must promptly file a "schedule of assets and liabilities," a "schedule of current income and current expenditures," and a "statement of the debtor's financial affairs." 11 U.S.C. 521(a)(1)(B)(i)-(iii); Fed. R. Bankr. P. 1007(b), 1008.

In a liquidation proceeding under Chapter 7 of the Bankruptcy Code, a trustee for the estate will be selected. 11 U.S.C. 701, 702. The debtor must then "surrender to the trustee all [non-exempt] property of the estate" and records "relating to property of the estate." 11 U.S.C. 521(a)(4). After taking custody of the estate property, the trustee will liquidate it and disburse the proceeds to creditors in accordance with their rights and priorities under the Code. 11 U.S.C. 507, 704, 726. The court may thereafter discharge the debtor from further responsibility for his debts. 11 U.S.C. 727.

The court in a Chapter 7 case may deny a discharge, however, if the debtor, "with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of the property," has "transferred, removed, destroyed, mutilated, or concealed" the "property of the debtor" or "property of the estate." 11

U.S.C. 727(a)(2). The court likewise may deny a discharge if the debtor unjustifiably conceals or fails to keep or preserve records pertaining to his financial condition or business transactions (11 U.S.C. 727(a)(3)); withholds from the trustee recorded information related to the debtor's property or financial affairs (11 U.S.C. 727(a)(4)(D)); knowingly and fraudulently makes a false oath or account in connection with the bankruptcy case (11 U.S.C. 727(a)(4)(A)); or (with exceptions not relevant here) refuses to obey any lawful court order (11 U.S.C. 727(a)(6)(A)). The court may also impose a variety of sanctions for discovery misconduct in an adversary proceeding, including the entry of "a default judgment against the disobedient party" or a determination that alleged "facts be taken as established." Fed. R. Bankr. P. 7037; Fed. R. Civ. P. 37(b)(2)(A)(i) and (vi).

b. Bankruptcy judges are "judicial officers of the United States district court," who are appointed to 14-year terms by the courts of appeals and are removable for cause only by judicial councils. 28 U.S.C. 152(a)(1) and (e). In *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court recognized that "the core of the federal bankruptcy power," which had long been exercised by non-Article-III decisionmakers, was "the restructuring of debtor-creditor relations." *Id.* at 71 (plurality opinion). It "distinguished" that core power "from the adjudication of state-created private rights," *ibid.*, and it held that "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas* v.

Union Carbide Agric. Prods. Co., 473 U.S. 568, 584 (1985).

Congress responded to *Northern Pipeline* by enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984 (1984 Act), Pub. L. No. 98-353, 98 Stat. 333. The 1984 Act vests in federal district courts original (and sometimes exclusive) jurisdiction over all bankruptcy cases and related civil proceedings. 28 U.S.C. 1334(a) and (b). It provides, however, that a district court may refer such a case or proceeding to a bankruptcy judge in its district and may, at any time, withdraw such a reference "in whole or in part," either "on its own motion or on timely motion of any party." 28 U.S.C. 157(a) and (d).

The 1984 Act also sought to codify *Northern Pipeline*'s distinction between "[c]ore" bankruptcy proceedings and "[n]on-core" proceedings. 28 U.S.C. 157(b)(2) and (4). The Act's definition of core proceedings includes, *inter alia*, "matters concerning the administration of the estate," "orders to turn over property of the estate," "objections to discharges," and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims." 28 U.S.C. 157(b)(2)(A), (E), (J), and (O). When the reference in a core proceeding has not been withdrawn, the bankruptcy judge may "enter appropriate orders and judgments," which are subject to appellate review in the district court. 28 U.S.C. 157(b)(1), 158. In a non-core proceeding, by contrast, the bankruptcy judge may enter judgment only "with the consent of all the parties to the proceeding." 28 U.S.C. 157(c)(2). Absent such consent, the bankruptcy judge may "hear" a non-core proceeding and

"submit proposed findings of fact and conclusions of law to the district court," which may then enter "any final order or judgment" after "de novo" review in light of the parties' "timely and specific[] object[ions]." 28 U.S.C. 157(c)(1).

The Court has held that some proceedings defined as "core" under the statute cannot, consistent with Article III, be finally adjudicated by a bankruptcy judge without the parties' consent. See *Executive Benefits Ins. Agency* v. *Arkison*, 134 S. Ct. 2165, 2170 & n.4, 2172 (2014). Such claims are commonly known as "*Stern* claims," *id.* at 2170, after the Court's decision in *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011). The Court in *Stern* held that, although the statutory definition of core proceedings includes "counterclaims by the estate against persons filing claims against the estate," 28 U.S.C. 157(b)(2)(C), the bankruptcy judge lacks constitutional authority to enter final judgment on a state-law counterclaim over the creditor's objection if resolution of the counterclaim would require factual and legal determinations that would not otherwise be made in the course of resolving objections to the creditor's proof of claim. 131 S. Ct. at 2608-2620.

2. This case arises out of petitioners' efforts to collect a judgment ordering respondent to pay petitioners more than $655,000 in attorney's fees. Pet. App. 95a.

a. In 2008, a district court entered the fee award as a sanction for respondent's long-running misconduct in litigation with petitioners. Pet. App. 4a-6a. By February 2009, petitioners' attempts to collect on the award had been so frustrated that the district court held respondent in contempt and released him only upon his promise to respond to discovery. *Id.* at 6a.

b. Respondent ignored that order and, two weeks later, filed a voluntary petition under Chapter 7 of the Bankruptcy Code. Pet. App. 6a. He identified petitioners as creditors, and they filed a proof of claim. *Id.* at 6a-7a. Petitioners found a 2002 loan application in which respondent had declared that he owned businesses, real property, and financial accounts with a collective value of more than $5 million—none of which he had disclosed in the attorney's-fee litigation. *Id.* at 7a. Petitioners and the Chapter 7 trustee requested documentation relating to those assets. *Ibid.* Rather than provide the documents, respondent stated that he had lied on the loan application and that the listed assets were actually owned by a trust established by his mother, Soad Wattar, for which respondent claimed to be the trustee. *Ibid.*

Petitioners requested documents evidencing the formation and funding of the Soad Wattar trust, but respondent again failed to comply. Pet. App. 72a. Pursuant to 11 U.S.C. 521(a) and 542(a), the Chapter 7 trustee then sought a court order directing respondent to turn over all documents relating to the trust and its assets. Pet. App. 72a. The bankruptcy court issued the order, but respondent did not comply. *Ibid.*

c. In August 2009, petitioners initiated an adversary proceeding in the bankruptcy court against respondent "individually and as trustee of the Soad Wat[t]ar trust." J.A. 23 (capitalization altered); see Pet. App. 72a-73a. Petitioners described respondent's history of failing to cooperate with discovery, and they specifically focused on his refusal "to provide any documents evidencing the formation or funding of" the Soad Wattar trust. J.A. 12. "The first four counts of [petitioners'] complaint sought to prevent discharge of [respondent's] debts."

Pet. App. 45a; see J.A. 13-19. Count I alleged that respondent, with the intent to deceive, had concealed property that he previously claimed to own by claiming that it was owned by the Soad Wattar trust. J.A. 13-14. Petitioners alleged that the trust was "organized and operated as a mere tool or business conduit of" respondent, and that there was "such unity between" respondent and the alleged trust that "continuing to recognize their separateness would sanction a fraud or promote injustice." J.A. 14-15. In Count V, petitioners requested a "declaratory judgment that the Soad Wattar Living Trust is the alter ego of [respondent] and that all assets of the trust should be treated as part of [the bankruptcy] estate." J.A. 21.

Respondent admitted that the action was a core proceeding under 28 U.S.C. 157(b)(2)(J), which applies to objections to discharge. J.A. 24. Respondent's motion to dismiss stated—for purposes of multiple counts of the complaint, including the alter-ego count—that the trust property was "not property of the estate." 09-770 Bankr. Ct. Doc. 16, at 5, 10, 11 (Dec. 3, 2009). Respondent's answer urged the bankruptcy court to "find that the Soad Wattar Living Trust is not property of the estate." J.A. 44.

d. In July 2010, the bankruptcy court denied respondent a discharge and entered a default judgment in favor of petitioners on all five counts of the complaint, as a sanction for respondent's failures to "carr[y] out his discovery obligations." Pet. App. 120a. With respect to the declaratory-judgment count, the court stated that the Soad Wattar trust was respondent's alter ego "because [respondent] treats its assets as his own property and it would be unjust to allow [him] to

maintain that the trust is a separate entity." *Id.* at 119a.

3. Respondent appealed the bankruptcy court's order to the district court, which affirmed. Pet. App. 69a-91a.

a. The district court held that the bankruptcy court had not abused its discretion in entering a default judgment for respondent's failure to comply with court-ordered discovery. Pet. App. 84a-90a. The court noted that, under the applicable rules of procedure, a default judgment may be an appropriate sanction against a party who breaches an order compelling answers to discovery and displays willfulness, bad faith, or fault. *Id.* at 84a. The district court found numerous deficiencies in respondent's discovery responses and concluded that the record amply supported the bankruptcy court's implicit finding of willfulness and bad faith. *Id.* at 89a-90a.

b. The district court also rejected respondent's contention—raised for the first time in a request for supplemental briefing—that, in light of *Stern*, the bankruptcy court lacked jurisdiction to enter judgment on petitioners' adversary complaint. Pet. App. 90a-91a. The court denied the request as untimely, noting that *Stern* had been decided a month and a half before respondent filed his opening brief. *Id.* at 91a.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-66a.

a. The court of appeals held that it was required to resolve respondent's constitutional objection to the bankruptcy court's entry of final judgment, even though that objection had not been raised in a timely fashion. Pet. App. 34a-45a. The court concluded that, although the *Stern* objection did not concern the bankruptcy

court's subject-matter jurisdiction, it was premised on a structural, separation-of-powers principle that cannot be waived by litigants. *Id.* at 34a-42a.

b. On the merits, the court of appeals held that the bankruptcy court had constitutional authority to decide the first four counts of petitioners' adversary complaint, which opposed respondent's request for discharge under 11 U.S.C. 727. Pet. App. 45a. The court reasoned that petitioners' objections to discharge stemmed from federal bankruptcy law, not state law, and that questions of dischargeability are central to the restructuring of the debtor-creditor relationship. *Id.* at 45a-46a. The court of appeals concluded, however, that Count V of petitioners' complaint asserted "a state-law claim between private parties that is wholly independent of federal bankruptcy law and is not resolved in the claims-allowance process." *Id.* at 51a. It held that the bankruptcy court lacked authority to enter default judgment declaring the trust to be respondent's alter ego. *Ibid.*

SUMMARY OF ARGUMENT

I. Consistent with Article III, a bankruptcy court may decide matters that stem from bankruptcy itself and are "integral to the restructuring of the debtor-creditor relationship." *Stern* v. *Marshall*, 131 S. Ct. 2594, 2617 (2011) (citation omitted). At least in the absence of the parties' consent, however, the bankruptcy court may not enter final judgment on state-law tort or contract actions that could augment the bankruptcy estate but otherwise "exist[] without regard to any bankruptcy proceeding." *Id.* at 2618.

A. In this case, the bankruptcy court's declaratory judgment that certain assets were property of the es-

tate at the commencement of the proceeding was not a determination reserved to Article III judges.

1. The bankruptcy estate was "create[d]," upon the filing of respondent's bankruptcy petition, by operation of the Bankruptcy Code. 11 U.S.C. 541(a). Establishing the extent of the estate in that *in rem* proceeding was inescapably central to the restructuring of the debtor-creditor relationship and stemmed from the bankruptcy itself, not from state law. By holding that such a foundational determination lies beyond bankruptcy judges' powers, the Seventh Circuit dramatically departed from the established division of labor between bankruptcy and district judges.

2. The bankruptcy court's authority to determine that putative trust assets were property of the estate was especially clear in this case, because there is no dispute that the court validly denied respondent a discharge under 11 U.S.C. 727 for concealing property of the estate. That denial rested on a determination that the assets were property of the estate for reasons that materially duplicated the premises of petitioners' alter-ego claim.

B. The alter-ego determination did not augment the estate, because it merely established what property was attributable to the debtor when the bankruptcy proceeding began. The court of appeals also erred in assuming that the alter-ego determination was ultimately controlled by state property law. Such determinations are equitable in nature, and, because they ensure fair and efficacious bankruptcy proceedings, are ultimately subject to a federal "rule of decision," even if that rule generally incorporates state alter-ego law to the extent that it does not frustrate the objectives of

federal bankruptcy law. *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979).

II. Even if a timely objection could have precluded the bankruptcy court from adjudicating petitioners' alter-ego claim, respondent's implied consent to bankruptcy-court adjudication both legitimated that court's decision and disentitled respondent to relief on appeal.

A. In a bankruptcy proceeding, the right to a final adjudication by an Article III judge is a waivable personal interest. The division of authority between a district court and its bankruptcy judge does not implicate subject-matter jurisdiction. When identifying Article III concerns in the bankruptcy context, the Court has repeatedly referred to the presence of a party's objection. In cases involving magistrate judges, this Court and the courts of appeals have recognized that litigant consent can authorize the entry of final judgment by a non-Article III judge who is subject to sufficient control by Article III judges.

Consent to bankruptcy-judge adjudication may properly be inferred from litigation conduct. Here, respondent filed a bankruptcy petition and never sought to withdraw the reference to the bankruptcy judge. He also repeatedly urged the bankruptcy judge to decide, on the merits, that the disputed assets were not property of the estate.

B. Even if respondent's consent did not cure any constitutional error, his failure to make a timely objection disentitled him to relief on appeal. Parties routinely forfeit constitutional rights—even structural ones—by failing to make contemporaneous objections. *United States* v. *Olano*, 507 U.S. 725, 731 (1993); *Freytag* v. *Commissioner*, 501 U.S. 868, 893-898 (1991) (Scalia, J. concurring in part and concurring in the judgment).

Here, respondent failed to make his current objection in the bankruptcy court, and he did not raise the issue in his brief on appeal in the district court, which was filed six weeks after this Court decided *Stern*. And even after the district court had rejected such a claim as untimely, respondent again failed to include a *Stern* objection in his opening brief in the Seventh Circuit. The court of appeals erred in concluding that it was obligated to consider respondent's belated constitutional objection.

ARGUMENT

I. ARTICLE III DOES NOT PRECLUDE A BANKRUPTCY JUDGE FROM DETERMINING WHETHER PARTICULAR ASSETS CONSTITUTE PROPERTY OF THE ESTATE

"Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848 (1986). In disputes concerning "public rights"—rights that are closely intertwined with a federal program that Congress has power to enact—Congress may authorize adjudication by a non-Article III entity subject to deferential review by an Article III court. See, *e.g.*, *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 54-55 (1989).

In the bankruptcy context, the Court has distinguished between private actions that "seek 'to augment the bankruptcy estate'" and public actions that "seek 'a pro rata share of the bankruptcy res.'" *Stern* v. *Marshall*, 131 S. Ct. 2594, 2618 (2011) (quoting *Granfinanciera*, 492 U.S. at 56). A non-Article III judge may resolve disputes within the latter category, which include matters that are "integral to the restructuring of the debtor-creditor relationship," or that "stem[] from

the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.* at 2617, 2618 (citation omitted). In *Stern*, the Court concluded that a counterclaim for tortious interference was "a state tort action that exists without regard to any bankruptcy proceeding" and was "in no way derived from or dependent upon bankruptcy law." *Id.* at 2618. The Court held that the bankruptcy court in that case "lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." *Id.* at 2620.

A. Determining The Scope Of The Property Of The Estate Stems From Bankruptcy Itself

Petitioners' adversary proceeding sought to establish that assets purportedly held in trust were actually respondent's property, and therefore property of the bankruptcy estate. That is precisely the kind of action that bankruptcy courts may decide. Determining whether particular assets are estate property is "integral to the restructuring of the debtor-creditor relationship" and "stems from the bankruptcy itself." *Stern*, 131 S. Ct. at 2617, 2618 (citation omitted).

1. Identifying the property of the estate is central to the restructuring of the debtor-creditor relationship

The filing of a petition for bankruptcy "creates an estate" that generally includes "all legal or equitable interests of the debtor in property as of the commencement of the case," "wherever located and by whomever held." 11 U.S.C. 541(a) and (a)(1). That estate may later be augmented by the trustee's recovery on claims against third parties. 11 U.S.C. 541(a)(3). By operation of federal law, however, the mere com-

mencement of the proceeding creates the estate, which provides the foundation for virtually everything that follows.

"Bankruptcy jurisdiction, at its core, is *in rem*." *Central Va. Community Coll.* v. *Katz*, 546 U.S. 356, 362 (2006). The estate is created, marshaled, and ultimately distributed to the creditors on the basis of their "hierarchically ordered claims to a pro rata share of the bankruptcy res." *Granfinanciera*, 492 U.S. at 56. Identifying the property of the estate is therefore inescapably central to the restructuring of the debtor-creditor relationship. It is a prerequisite for routine aspects of bankruptcy administration, such as permitting the trustee to use, sell, or lease the property of the estate to preserve its value during bankruptcy, 11 U.S.C. 363, and for calculating each creditor's pro-rata share of estate assets. Knowing the extent of the estate is so crucial that the debtor's concealment of estate property can be grounds for denying the discharge that often motivates the entire bankruptcy proceeding. 11 U.S.C. 727(a)(2).

The need to identify the property of the estate therefore "stems from the bankruptcy itself" (*Stern*, 131 S. Ct. at 2618), notwithstanding the fact that, "[u]nless some federal interest requires a different result," "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Butner* v. *United States*, 440 U.S. 48, 54-55 (1979); cf. 28 U.S.C. 157(b)(3) ("A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law."). Petitioners' assertion that particular assets were estate property, and respondent's contention that they were not estate property because he held

them merely in trust, are both rooted in Section 541. See 11 U.S.C. 541(a)(1) and (d); *Begier* v. *IRS*, 496 U.S. 53, 59 (1990) ("Because the debtor does not own an equitable interest in property he holds in trust for another, that interest is not 'property of the estate.'"). The parties' dispute is therefore quite different from the tortious-interference claim in *Stern*, which was "in no way derived from or dependent upon bankruptcy law" but instead predated the bankruptcy proceeding. 131 S. Ct. at 2618; see *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 56 (1982) (plurality opinion) (state-law damages action for breaches of contract and warranty).

Accordingly, bankruptcy courts have, since *Stern*, regularly concluded that they possess the constitutional authority to determine whether an interest constitutes property of the estate as defined in Section 541.[1] The court of appeals' contrary conclusion would vitiate the Court's assurances in *Stern* that its holding about "one isolated" limit on core bankruptcy jurisdiction would not "meaningfully change[] the division of labor in the current statute." 131 S. Ct. at 2620.

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[1] See, *e.g.*, *Murphy* v. *Felice (In re Felice)*, 480 B.R. 401, 418 (Bankr. D. Mass. 2012) ("[A]n action under [Section] 541 to determine whether an interest of the debtor is property of the estate stems from the bankruptcy, affects only the debtor's property interests, and does not augment the estate."); *Velo Holdings Inc.* v. *Paymentech, LLC (In re Velo Holdings Inc.)*, 475 B.R. 367, 387 (Bankr. S.D.N.Y. 2012) (Determining whether processing agreements are property of the estate "is an essential part of administration of the bankruptcy estate and stems from the bankruptcy itself.").

2. Whether the putative trust assets were property of the estate was legitimately resolved by the bankruptcy court in ruling on Counts I-IV of petitioners' adversary complaint

The bankruptcy court's authority to determine whether purported trust assets were estate property is particularly clear on the facts of this case. *Stern* did not disturb the line of decisions represented by *Katchen* v. *Landy*, 382 U.S. 323 (1966), and *Langenkamp* v. *Culp*, 498 U.S. 42 (1990) (per curiam), which upheld the authority of bankruptcy courts to adjudicate trustees' voidable-preference claims against persons who have filed claims against the estate. See *Stern*, 131 S. Ct. at 2616-2617. Bankruptcy courts often must decide whether a voidable preference has occurred in order to determine whether a creditor's own claim should be allowed. See *ibid.* If, in the course of ruling on the creditor's claim, the bankruptcy court appropriately determines that a voidable preference has occurred, it may take the further (and largely ministerial) step of ordering that the amounts paid through the preferential transfer be returned to the estate. See *id.* at 2616.

The same principle applies here. The court below held (Pet. App. 45a-46a), and respondent has not disputed (Resp. C.A. Reply Br. 8-9), that the bankruptcy court was authorized to decide Counts I-IV of petitioners' complaint. Those counts requested that respondent be denied a discharge in light of, *inter alia*, his alleged concealment of property of the estate. Count I was devoted entirely to respondent's alleged concealment of his interest in the Soad Wattar trust assets. J.A. 13-15.

Count I specifically alleged that the trust was "organized and operated as a mere tool or business conduit of" respondent, and that there was "such unity be-

tween" respondent and the alleged trust that "continuing to recognize their separateness would sanction a fraud or promote injustice." J.A. 14-15. That objection to discharge materially duplicated the fundamental premises of the alter-ego claim in Count V. See J.A. 19-20 (alleging that the trust had been operated as a "mere tool or business conduit of" respondent, and that continuing to recognize any "separateness" between respondent and the trust "would sanction a fraud or promote injustice"). Indeed, when respondent moved to dismiss the complaint, he contended *with respect to Count I* that he held the relevant assets in trust, which prevented them from being "property of the estate." 09-770 Bankr. Ct. Doc. 16, at 4-5.

The bankruptcy court's grant of judgment for petitioners on Count I rested on its determination that the concealed trust assets were "property of the Debtor." Pet. App. 118a. The court's grant of declaratory relief under Count V likewise rested on a determination that the trust was respondent's alter ego "because [respondent] treats its assets as his own property and it would be unjust to allow [him] to maintain that the trust is a separate entity." *Id.* at 119a. To be sure, the grant of declaratory relief under Count V may ultimately have practical consequences that extend beyond the denial of discharge. The same was true in *Katchen* and *Langenkamp*, however, where the issuance of orders directing that preferential transfers be returned to the estate went beyond the disallowance of the transferees' own claims. See *Katchen*, 382 U.S. at 334-335 ("[I]t is well within the equitable powers of the bankruptcy court to order return of the preference during the summary proceedings on allowance and disallowance of claims.").

B. The Bankruptcy Court's Alter-Ego Determination Neither Augmented The Estate Nor Resolved A Purely State-Law Issue

The court of appeals acknowledged that its "analysis of the alter-ego claim [was] somewhat hampered by the [default-judgment] posture of this case," which prevented the bankruptcy court from addressing the merits (as opposed to whether judgment was an appropriate sanction for respondent's misconduct). Pet. App. 46a. On the basis of its "independent research," however, the court of appeals concluded that petitioners were effectively asserting a veil-piercing claim under Illinois common law that was "intended only to augment the bankruptcy estate." *Id.* at 46a, 48a. That analysis was misconceived.

1. An alter-ego determination in the context of Section 541 does not *augment* the estate. It merely identifies an entity that is, as the phrase itself connotes, the debtor's "second self." *Webster's Third New International Dictionary of the English Language* 63 (1993). Determining whether a nominally separate entity is the debtor's alter ego is therefore necessary to identify, as 11 U.S.C. 541(a)(1) contemplates, what property interests were attributable to "the debtor * * * as of the commencement of the case."

2. The court of appeals also erred in assuming that an alter-ego determination is ultimately controlled by state property law. That determination is instead a product of the equitable powers that federal law vests in bankruptcy judges.

a. The underlying property interests at issue in a bankruptcy proceeding are usually "created and defined by state law," "[u]nless some federal interest requires a different result." *Butner*, 440 U.S. at 55.

But bankruptcy courts retain "equity powers" that "play an important part in the administration of bankrupt estates in countless situations in which the judge is required to deal with particular, individualized problems." *Id.* at 55-56. Bankruptcy courts are authorized to "issue any order, process, or judgment that is necessary or appropriate to carry out" the Bankruptcy Code. 11 U.S.C. 105(a). While that power must "be exercised within the confines of" the Code, *Law* v. *Siegel*, 134 S. Ct. 1188, 1194 (2014) (quoting *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 206 (1988)), bankruptcy courts may apply equitable principles in determining pursuant to Section 541 whether particular assets were the debtor's property, and therefore became property of the estate when the bankruptcy case commenced.

Alter-ego or veil-piercing decisions are rooted in equity. See *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R.*, 417 U.S. 703, 713 (1974) ("courts of equity, piercing all fictions and disguises, will deal with the substance of the action"); see also *Pepper* v. *Litton*, 308 U.S. 295, 307-309, 312 (1939) (noting that, when "sit[ting] as a court of equity" and ruling on the allowance of claims, a bankruptcy court has a "duty" to "undo" conduct through which a corporate officer seeks to defraud the creditors by using the debtor "merely as a corporate pocket"). Long before the current Bankruptcy Code was enacted, alter-ego determinations were recognized as being within the equitable powers of bankruptcy judges' non-Article III predecessors.

In *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U.S. 215 (1941), for example, the bankruptcy referee determined that a family corporation was "'nothing but a sham and a cloak' devised by [the debtor] * * * for the purpose of hindering, delaying and defrauding his

creditors." *Id.* at 217. The referee accordingly ordered that the property of the corporation be treated as property of the bankruptcy estate, to be administered by the trustee for the benefit of the creditors. *Ibid.* In sustaining the referee's order, this Court held that "[t]here can be no question but that the jurisdiction of the bankruptcy court was properly exercised by summary proceedings," and that the corporation could not "insist on a plenary suit" before the district court. *Id.* at 218. Under the Code, courts have continued to exercise the equitable power to treat nominally separate entities as debtors' alter egos.[2]

b. To be sure, federal courts implementing federal statutes have often looked to state law when engaging in alter-ego analysis, and any differences between state and federal alter-ego law are often irrelevant in practice. See, *e.g.*, *United States* v. *Bestfoods*, 524 U.S. 51, 63 n.9 (1998) (finding it unnecessary to determine whether, for purposes of federal environmental statute, "courts should borrow state law, or instead apply a federal common law of veil piercing"). A State's more "restrictive law of veil piercing," however, should not be "allowed to undermine the effectiveness of a federal

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[2] See, *e.g.*, *In re Bonham*, 229 F.3d 750, 765 (9th Cir. 2000) (explaining that "the equitable power" to effect a substantive consolidation of nominally distinct corporations "undoubtedly survived enactment of the Bankruptcy Code"); see also *In re Owens Corning*, 419 F.3d 195, 207-209 (3d Cir. 2005) (collecting cases holding that bankruptcy courts may make cumulative pool of assets available to satisfy creditors' claims where equity warrants disregarding corporate entities' separate legal identities), cert. denied, 547 U.S. 1123 (2006). Although most such cases have involved corporations, a trust is also voidable where recognizing its validity would be contrary to public policy. See Restatement (Third) of Trusts § 29 cmt. f, at 56-57 (2003).

statute." *Illinois Bell Tel. Co.* v. *Global NAPs Ill., Inc.*, 551 F.3d 587, 598 (7th Cir. 2008). When a bankruptcy court looks to state law in this context, it is vindicating the federal interests in fair and efficacious bankruptcy proceedings. Alter-ego questions are therefore decided under a "federal rule of decision," even if that rule incorporates state law to the extent that it does not "frustrate specific objectives of the federal program[]." *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979); see *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97-98 (1991) ("any common law rule necessary to effectuate a private cause of action under [a federal] statute is necessarily federal in character," even when it incorporates state-law standards).

II. RESPONDENT'S IMPLIED CONSENT TO ADJUDICATION BY THE BANKRUPTCY COURT PROVIDED AN INDEPENDENT CONSTITUTIONAL JUSTIFICATION FOR THAT COURT'S ENTRY OF JUDGMENT

For the foregoing reasons, the bankruptcy court could constitutionally have entered judgment on Count V of petitioners' complaint with or without respondent's consent. But even if *Stern* would otherwise have precluded the bankruptcy court from taking that step, the court of appeals erred in concluding that "a litigant may not waive" a *Stern* objection. Pet. App. 45a. Respondent's implied consent to bankruptcy-court adjudication both legitimated the bankruptcy court's conduct and disentitled respondent to relief on appeal.

A. In A Bankruptcy Proceeding, The Right To A Final Adjudication By An Article III Judge Is A Waivable Personal Interest

In *Schor*, the Court held that "Article III, § 1's guarantee of an independent and impartial adjudication by

the federal judiciary of matters within the judicial power of the United States * * * serves to protect primarily personal, rather than structural, interests." 478 U.S. at 848. The Court further explained that, "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Id.* at 848-849. The Court observed, however, that Article III "also serves as an inseparable element of the constitutional system of checks and balances" by "preventing the encroachment or aggrandizement of one branch at the expense of the other." *Id.* at 850 (citations and internal quotation marks omitted). It recognized that, "[t]o the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty." *Id.* at 850-851.

The right to insist on adjudication by an Article III judge in a bankruptcy proceeding is "primarily personal." *Schor*, 478 U.S. at 848. Thus, even assuming that respondent was entitled to insist that the alter-ego claim be decided by an Article III judge, he could also validly consent to its resolution by the bankruptcy court.

1. The division of tasks between a district court and its bankruptcy judge does not implicate subject-matter jurisdiction, which is vested in the district court

Respondent argued below (Resp. C.A. Reply Br. 15-16) that a bankruptcy court lacks "jurisdiction" over *Stern* claims. The court of appeals correctly rejected that contention. Pet. App. 33a-34a.

Bankruptcy judges have been given no jurisdiction of their own; their authority depends entirely on a dis-

trict court's reference of a case or proceeding within *its* jurisdiction. 28 U.S.C. 157(a) and (b). Although the Constitution and the statute limit the district courts' authority to seek assistance from bankruptcy judges, those limits do not implicate the subject-matter jurisdiction of either tribunal. See *Stern*, 131 S. Ct. at 2607. Rather, in this context, the better analogy is to "a defect in jurisdiction over the person," where waiver is eminently possible. *Pacemaker Diagnostic Clinic of Am., Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 543 (9th Cir.) (en banc) (Kennedy, J.) (drawing that analogy in the context of referrals, with consent, to magistrate judges), cert. denied, 469 U.S. 824 (1984).

2. In bankruptcy and similar contexts, the Court has relied on timely objections to trigger enforcement of a party's right to an Article III decisionmaker

In the absence of a timely objection, this Court has never found a violation of a litigant's constitutional right to an Article III decisionmaker.

a. When discussing bankruptcy practice, the Court has repeatedly recognized the importance of a party's objection. In *Schor*, the Court explained that "the absence of consent to an initial adjudication before a non-Article III tribunal was relied on as a significant factor in determining [in *Northern Pipeline*] that Article III forbade such adjudication." 478 U.S. at 849; see *Northern Pipeline*, 458 U.S. at 80 n.31 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in the judgment); *id.* at 95 (White, J., dissenting). And in *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), the Court gave the following description of what *Northern Pipeline* had "establishe[d]": "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a

traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review." *Id.* at 584 (emphasis added). The Court in *Stern* quoted and endorsed that description, saying: "Substitute 'tort' for 'contract,' and that statement directly covers this case." 131 S. Ct. at 2615; cf. *Executive Benefits Ins. Agency* v. *Arkison*, 134 S. Ct. 2165, 2170 (2014) (explaining that, before 1978, "[p]roceedings to augment the bankruptcy estate * * * implicated the district court's plenary jurisdiction and were not referred to the bankruptcy courts *absent both parties' consent*") (emphasis added).

The Court's articulations of the limits on bankruptcy-court authority have thus consistently made reference to the presence or absence of litigant consent.

b. The Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, provides that, "[u]pon the consent of the parties, a full-time United States magistrate judge * * * may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves." 28 U.S.C. 636(c)(1). Like bankruptcy judges, magistrate judges are appointed for a limited term and thus lack Article III's tenure protections. See 28 U.S.C. 631(e). In *Roell* v. *Withrow*, 538 U.S. 580 (2003), the Court held that the litigants' consent enabled a magistrate judge to enter final judgment in a damages action under 42 U.S.C. 1983. 538 U.S. at 581, 591. Recognizing that the statutory framework was "meant to preserve a litigant's [constitutional] right to insist on trial before an Article III district judge," the Court concluded that "the Article III right is substantially honored" when the parties are "made aware of the need for consent and the right

to refuse it" and still "voluntarily appear[]" before the magistrate judge for trial. *Id.* at 588, 590. The Court likewise treated the presence or absence of the parties' consent as decisive when determining whether Article III permits a magistrate judge to preside over *voir dire* in a felony case. See *Gonzalez* v. *United States*, 553 U.S. 242, 246 (2008).

The courts of appeals have uniformly held that, if the litigants consent, a magistrate judge may constitutionally enter final judgment in a case otherwise reserved to an Article III judge. In *Pacemaker Diagnostic Clinic*, for example, the Ninth Circuit recognized that the right to an adjudication by an Article III judge is "personal to the parties" and "may be waived." 725 F.2d at 542. With respect to separation-of-powers considerations, it further determined that Congress had not attempted to confer expanded subject-matter jurisdiction upon an Article III court; that no other branch of government was attempting to arrogate power from the judiciary to itself; and that the judiciary maintained constitutionally sufficient supervisory and managerial authority over the magistrate system, including the power to control which matters could be decided by magistrates and to conduct appellate review of magistrates' decisions. *Id.* at 543-546; see 12 Charles Alan Wright et al., *Federal Practice and Procedure* § 3071.1, at 398 n.18 (2d ed. 1997) (citing cases from 11 other circuits upholding the constitutionality of referrals to magistrate judges). The same analysis applies to bankruptcy judges.

c. The Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, provides another useful analogue. The FAA reflects Congress's effort "to ensure judicial enforcement of privately made agreements to arbitrate." *Dean*

Witter Reynolds Inc. v. *Byrd*, 470 U.S. 213, 219 (1985). The FAA thus treats litigant consent as a legitimate basis for use of an alternative decisionmaker in situations where the parties would otherwise have a right to an Article III judge. The Court has repeatedly enforced the FAA without suggesting that Congress, by facilitating the consensual use of non-Article III adjudicators, has encroached on the province of the Judicial Branch. In discussing the significance of litigant consent to adjudication by a non-Article III tribunal, the Court in *Schor* observed that, "just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences." 478 U.S. at 855.[3]

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[3] Arbitrators do differ from bankruptcy judges in meaningful respects. *Inter alia*, bankruptcy judges are officials of the federal government, while arbitrators are private actors. Thus, while the FAA simply mandates enforcement of private agreements to arbitrate, Congress has created the office of bankruptcy judge and has specified the process by which such judges are selected and assigned to particular cases. Cf. *Katz* v. *Cellco P'ship d/b/a Verizon Wireless*, No. 12 CV 9193 (VB), 2013 WL 6621022, at *9-*11 (S.D.N.Y. Dec. 12, 2013) (relying partly on same distinction in rejecting Article III challenge to enforcement of arbitration agreement under the FAA). That difference would have particular salience if bankruptcy judges were subject to executive- or legislative-branch control. Bankruptcy judges, however, are appointed and removable only by Article III judges, and the scope of their responsibilities in any individual case is likewise controlled by the district court. See pp. 27-28, *infra*.

3. *Bankruptcy-judge adjudications do not raise sufficient separation-of-powers concerns to render the Article III right nonwaivable*

The Court in *Schor* referred to a nonwaivable "structural" component of Article III. 478 U.S. at 850-851. Contrary to the court of appeals' conclusion (see Pet. App. 41a-42a), however, neither *Schor* nor *Stern* suggests that a bankruptcy court's entry of final judgment with the litigants' consent violates that structural principle. As discussed above (pp. 23-24, *supra*), *Stern* referred to the absence of litigant consent in its restatement of the governing Article III principle, and the Court explained that the creditor there "did not truly consent to resolution" by the bankruptcy judge of the counterclaim against him. 131 S. Ct. at 2614-2615. Thus, "[t]he constitutional bar" articulated and applied in *Stern* (*id.* at 2619) precluded adjudication of the state-law counterclaim by a non-Article III judge in the *absence* of the parties' consent.

The impingement on the judiciary in this case is manifestly less threatening than the regime at issue in *Schor*, which was held not to violate Article III even though it permitted an executive-branch agency to adjudicate common-law counterclaims. 478 U.S. at 850-857. Bankruptcy judges are "judicial officers of the United States district court," appointed by courts of appeals, and removable for cause by councils of Article III judges. 28 U.S.C. 152(a)(1) and (e), 332(a)(1). In every case, their authority depends entirely on a reference from a district court, which can be withdrawn, and their decisions are subject to appellate review by Article III judges. 28 U.S.C. 157(a) and (d), 158; cf. *Peretz* v. *United States*, 501 U.S. 923, 937 (1991) (finding no nonwaivable "structural protections" in the context of

magistrate judges because, *inter alia*, they are "appointed and subject to removal by Article III judges" and "[t]he 'ultimate decision' whether to invoke the magistrate's assistance is made by the district court, subject to veto by the parties") (citation omitted). Bankruptcy judges' authority to enter final judgment therefore does not risk "the encroachment or aggrandizement of one branch at the expense of the other" that would warrant making it nonwaivable by the parties. *Schor*, 478 U.S. at 850 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976) (per curiam)).

When a bankruptcy court enters final judgment on a contested matter, some aspects of its decision may be subject to deferential rather than de novo review on appeal. See Fed. R. Bankr. P. 8013 ("Findings of fact * * * shall not be set aside unless clearly erroneous."); Pet. App. 84a. The Court recognized long ago, however, that Article III judges may, with the parties' consent, authorize a non-Article III decisionmaker to make findings subject to limited review. In *Kimberly* v. *Arms*, 129 U.S. 512 (1889), the Court explained that a district court cannot "refer the entire decision of [an equity] case to a [master] without the consent of the parties," but, *with* the parties' consent, a referral order may authorize a master to make "findings, like those of an independent tribunal, [that] are to be taken as presumptively correct" and reviewed only for "manifest error." *Id.* at 524; see *Heckers* v. *Fowler*, 69 U.S. (2 Wall.) 123, 127, 133 (1865) (affirming judgment in breach-of-covenant action that, pursuant to the parties' agreement, was entered by the clerk of the United States Circuit Court for the Southern District of New York on the basis of a referee's report "as if the cause had been tried before the court").

4. The parties' consent to bankruptcy-judge adjudication may be inferred from their litigation conduct

Because the court of appeals found that an Article III challenge to bankruptcy-judge adjudication of a *Stern* claim could not be waived, it did not address what form consent would need to take. Pet. App. 45a.[4] One of the questions on which this Court granted certiorari, however, includes the subsidiary question "whether implied consent based on a litigant's conduct is sufficient to satisfy Article III." Pet. iii (third question presented). As the Ninth Circuit concluded in *Executive Benefits Insurance Agency* v. *Arkison (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553 (2012), aff'd on other grounds, 134 S. Ct. 2165 (2014), a litigant's consent to bankruptcy-court adjudication may properly be inferred when the litigant "was aware of its right to seek withdrawal of the reference but opted instead to litigate before the bankruptcy court." *Id.* at 569.

a. This Court's decisions support the validity of implied consent to adjudication by a non-Article III decisionmaker. The Court in *Schor* concluded that "an effective waiver" of the Article III right would exist even if there were "no evidence of an express waiver." 478 U.S. at 849. In the magistrate-judge context, the Court has inferred consent from the parties' litigation conduct even when the relevant Federal Rule of Civil Procedure (but not the governing statute) required express consent in writing. *Roell*, 538 U.S. at 586-587.

Under the Bankruptcy Code, "any party" may request that the district court withdraw the reference to

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[4] The Seventh Circuit has since stated that the decision below was limited to instances of forfeiture rather than "express and mutual waiver." *Peterson* v. *Somers Dublin Ltd.*, 729 F.3d 741, 747 (2013).

the bankruptcy court "for cause shown." 28 U.S.C. 157(d). And while a bankruptcy court's authority in non-core proceedings is ordinarily limited to submitting "proposed findings of fact and conclusions of law to the district court," 28 U.S.C. 157(c)(1), the court is authorized by statute to enter final judgment in such matters "with the consent of all the parties to the proceeding," 28 U.S.C. 157(c)(2). While Section 157(c) does not literally apply to proceedings that are "core" proceedings under the statute, this Court recently held that, when a statutorily core proceeding "may not, as a constitutional matter, be adjudicated as such," then "[t]he statute permits *Stern* claims to proceed as non-core within the meaning of § 157(c)." *Executive Benefits Ins. Agency* v. *Arkison*, 134 S. Ct. 2165, 2172-2173 (2014).

b. Respondent initiated a bankruptcy proceeding and never filed a motion to withdraw the reference to the bankruptcy court. Instead, he sought to have petitioners' alter-ego claim dismissed on the merits, asking the bankruptcy judge to find—for purposes of multiple counts of the complaint, including the count now at issue—that the trust property was "not property of the estate." See p. 7, *supra*; see also J.A. 44 (Answer: "Wherefore the debtor defendant asks * * * that the court find that the Soad Wattar Living Trust is not property of the estate.").[5]

Respondent has suggested (Br. in Opp. 9-11) that he could not have *knowingly* waived a constitutional right to request that the district court rule on Count V of the adversary complaint until *Stern* was decided. But the principal building blocks of *Stern*'s reasoning were

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[5] In the bankruptcy court, respondent admitted that the court had jurisdiction and that the adversary proceeding was "a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J)." J.A. 24.

contained in the Court's 1989 decision in *Granfinanciera*, which is why the parties in *Stern* had been litigating about the question for more than a decade. See *Stern*, 131 S. Ct. at 2601-2602, 2614. In any event, this Court has not treated perfect foreknowledge of the law as a prerequisite to constitutionally valid consent. See *Brady* v. *United States*, 397 U.S. 742, 757 (1970) (holding that "a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty [legal] premise" about the potential penalty).

B. Even If Respondent's Consent Did Not Legitimate The Entry Of Judgment By The Bankruptcy Court, His Failure To Assert A Timely Objection Disentitled Him To Relief On Appeal

"'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited * * * by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). In some circumstances, the effect of a litigant's agreement is that no error occurs at all. See *Olano*, 507 U.S. at 733 (explaining that, "[b]ecause the right to trial is waivable, and because the defendant who enters a valid guilty plea waives that right, his conviction without a trial is not 'error'"). In other instances, a trial judge may be legally forbidden to take particular action, even when the parties affirmatively request that he do so. See *Freytag* v. *Commissioner*, 501 U.S. 868, 896 (1991) (Scalia, J., concurring in part and concurring in the judgment) (if both parties urge a judge "to disregard a structural

limitation upon his power," "the judge must tell them no"). But even in that category of cases, a litigant's failure to assert a contemporaneous objection will often prevent him from obtaining after-the-fact relief on appeal. See *ibid.* (distinguishing whether a litigant's consent has a "*legitimating* effect" from whether "a judgment already rendered [must] be set aside because of an alleged structural error to which the losing party did not properly object"); *Stern*, 131 S. Ct. at 2608 (noting the "particularly severe" consequences that arise when a litigant is permitted to "remain[] silent about his objection and belatedly rais[e] the error only if the case does not conclude in his favor") (citation and internal quotation marks omitted). Thus, even if respondent's implied consent to the bankruptcy court's entry of final judgment did not *authorize* the court to exercise that power, it deprived respondent of any entitlement to reversal on appeal.

In this case, respondent's failure to abide by ordinary contemporaneous-objection requirements was particularly flagrant. Although *Stern* was decided more than six weeks before respondent filed his appellate brief in the district court, that brief did not dispute the bankruptcy court's authority to decide the alter-ego count of petitioners' adversary action. Pet. App. 90a-91a. And even after the district court rejected as untimely his attempt to introduce the question through supplemental briefing, respondent again failed to include a *Stern* objection in his opening brief in the court of appeals. Instead, he waited until his reply brief to devote more than nine pages to the issue. See Resp. C.A. Reply Br. 9-18.

To be sure, appellate courts may under rare circumstances correct even non-jurisdictional errors despite

the absence of a timely objection. See, *e.g.*, *Olano*, 507 U.S. at 731 (discussing Federal Rule of Criminal Procedure 52(b)). In this case, however, the court of appeals did not identify any extraordinary circumstance that would justify taking that step. Nor did the court describe its decision to entertain respondent's Article III challenge on appeal as an exercise of discretion. Rather, the court appeared to assume that, if respondent's constitutional challenge was not waivable in the "legitimating" sense described above—*i.e.*, if respondent's consent did not provide a constitutionally valid basis for the bankruptcy court's entry of judgment on Count V, see Pet. App. 31a-45a—then the court was *obligated* to entertain that challenge on appeal. See *id.* at 45a ("[W]e hold that under current law a litigant may not waive an Article III, § 1, objection to a bankruptcy court's entry of final judgment in a core proceeding. We thus turn to consider [respondent's] constitutional objection to the bankruptcy court's authority, despite the fact that he waited so long to assert it."). That was error. See *Freytag*, 501 U.S. at 894 (Scalia, J., concurring in part and concurring in the judgment) (agreeing that "appellate courts may, in truly exceptional circumstances, exercise discretion to hear forfeited claims," but finding "no basis for the assertion that the structural nature of a constitutional claim in and of itself constitutes such a circumstance").[6]

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[6] In no event should this Court affirm the aspect of the court of appeals' decision that directs the district court to withdraw the reference from the bankruptcy court and "set a new discovery schedule." Pet. App. 53a-54a. This Court's intervening decision in *Executive Benefits* establishes that, if the Code defines a particular proceeding as core but Article III precludes entry of final judgment by the bankruptcy court, the bankruptcy judge's deci-

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 2014

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sion may be treated as proposed findings of fact and conclusions of law. 134 S. Ct. at 2173-2175.

APPENDIX

1. 11 U.S.C. 105(a) provides:

Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

2. 11 U.S.C. 541 provides:

Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the

debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that—

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title;

(5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or step-grandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds—

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $5,000;

(6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined in section 529(b)(1) of such Code) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or

step-grandchild of the debtor for the taxable year for which funds were paid or contributed;

(B) with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(6) of such Code with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and

(C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $5,000;

(7) any amount—

(A) withheld by an employer from the wages of employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title; or

(B) received by an employer from employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where—

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b); or

(9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made—

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor),

unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the

debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e) In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal place of abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.

(f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

3. 11 U.S.C. 727(a) provides:

Discharge

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise

of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case—

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within 8 years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort;

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter;

(11) after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111, except that this paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses under this section (The United States trustee (or the bankruptcy administrator, if any) who makes a determination de-

scribed in this paragraph shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter.); or

(12) the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is reasonable cause to believe that—

(A) section 522(q)(1) may be applicable to the debtor; and

(B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

4. 28 U.S.C. 157 provides:

Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the

bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

5. 28 U.S.C. 158 provides:

Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals[1]

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

(A) there are insufficient judicial resources available in the circuit; or

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[1] So in original. Probably should be followed by a dash.

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)(1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless—

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal;

to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of

appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

6. 28 U.S.C. 636(b)-(c) provides:

Jurisdiction, powers, and temporary assignment

* * * * *

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief,

for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial[1] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept,

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[1] So in original. Probably should be "post-trial".

reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

(2) A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar

membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate judge designated to exercise civil jurisdiction under paragraph

(1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection.

(5) The magistrate judge shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

7. 28 U.S.C. 1334(a)-(b) provides:

Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

AMICUS CURIAE BRIEF

No. 13-935

In The
Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LIMITED, RALPH OATS, AND CATHY OATS,

Petitioners,

v.

RICHARD SHARIF,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

In this *amicus* brief, the American Bar Association responds only to the second Question Presented:

Whether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant's conduct is sufficient to satisfy Article III.

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Bar Association ("ABA"), as *amicus curiae,* submits this brief in support of Petitioners. The ABA requests that the Court clarify that Article III of the United States Constitution permits the bankruptcy courts, upon consent of the parties, to hear, determine and enter final orders and judgments in non-core and *Stern* claims,[2] under 28 U.S.C. § 157(c)(2) of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("1984 Act").

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from all fifty states and other jurisdictions, and include attorneys in law firms, corporations, non-profit organizations, and state and federal governments. Members also include

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

[2] As defined by the Court in *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2170 (2014), a "*Stern* claim," from *Stern v. Marshall*, 131 S. Ct. 2594 (2011), is "a claim designated for final adjudication in the bankruptcy court as a statutory matter [i.e., a "core" claim], but prohibited from proceeding in that way as a constitutional matter."

judges, law professors, law students, and non-lawyer associates in related fields.[3]

Since its founding in 1878, the ABA has worked to protect the rights guaranteed by the Constitution, including those protected by Article III. The ABA has also long-supported the bankruptcy courts. In 1978, for example, the ABA formed the Task Force on Revision of the Bankruptcy Laws, and in 1983, following this Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the ABA adopted as policy the recommendations of its Special Committee on Coordination of Federal Judicial Improvements that urged Congress to adopt legislation that would provide, *inter alia,* for party consent to bankruptcy court adjudications.[4]

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[3] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council before filing.

[4] ABA Policy # 303 (adopted February 1983) was archived in February 1998, and therefore is no longer ABA policy. It is, however, maintained in the ABA archives and available on request. Only resolutions, but not their supporting reports, that are adopted by vote of the ABA's House of Delegates ("HOD") become ABA policy. The HOD now has 560 delegates representing states and territories, state and local bar associations, affiliated organizations, and ABA sections, divisions, and members, among others. *See* ABA Leadership, House of Delegates, General Information, available at http://www.abanet.org/leadership/delegates.html.

Following this Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the ABA concluded that both the individual rights of litigants and the structural interests prongs of Article III are satisfied when, with litigant consent, non-Article III bankruptcy courts hear, determine, and enter final orders and judgments in non-core and *Stern* claims, and that there are real, practical benefits to the federal court system when litigants consent to proceed in the bankruptcy courts. Accordingly, the ABA adopted a policy supporting the position, *inter alia*, that:

> Bankruptcy Judges have the authority . . . upon the consent of all the parties to the proceeding, to hear, determine, and enter final orders and judgments in those proceedings that, while they may be among those designated as 'core' within the meaning of 28 U.S.C. § 157(b), may not otherwise be heard and determined by a non-Article III tribunal absent the parties' consent, as being consistent with and not violative of Article III of the United States Constitution.[5]

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[5] ABA Policy # 109 (adopted February 2013), available at http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2013_hod_midyear_meeting_109.docx. In addition, concerned that *Stern v. Marshall* might be seen as calling into question the constitutionality of the consent provisions of the Federal Magistrates Act, 28 U.S.C. § 636(c)(1), the ABA adopted similar policy supporting that Act's grant to magistrate judges "upon the consent of the parties, the power to conduct any and all proceedings in a jury or non-jury civil matter in federal court and to order the entry of judgment in the case, as

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Based on this policy, the ABA filed an *amicus* brief in *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2174 (2014), in which it asserted that the holding of *Stern v. Marshall* should not be expanded to eliminate the ability of litigants to consent to adjudications by bankruptcy and other non-Article III courts.[6] In that *amicus* brief, the ABA illustrated the impact on the district courts and litigants if bankruptcy courts could no longer hear and determine fraudulent transfer, preference, and state-law counterclaims, with litigant consent, or recommend proposed findings of fact and conclusions of law to the district courts.[7]

The ABA now requests that the Court clarify, consistent with the Court's precedents, that Article III permits the bankruptcy courts, with litigant

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being consistent with and not violative of Article III of the United States Constitution." ABA Policy # 10B (adopted February 2012), available at http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_midyear_meeting_10b.doc.

[6] Brief available at http://www.americanbar.org/content/dam/aba/administrative/amicus/121200bsacamericanbarassn.authcheckdam.pdf.

[7] For its amicus brief filed in *Executive Benefits*, the ABA gathered case filing data from the CM/ECF system for a sample district from each circuit for the four-year period of July 1, 2009 through June 30, 2013. As demonstrated in the ABA's chart summarizing that analysis, those eleven district courts would have been required to hear and decide at least 37,639 additional cases during that period. Spread out over the entire federal court system, the shift in work load would have been significant.

consent, to hear, determine and enter final orders and judgments in non-core and *Stern* claims under § 157(c)(2).

SUMMARY OF THE ARGUMENT

In *Executive Benefits,* this Court reserved the second question on which certiorari has now been granted, stating, "[T]his case does not require us to address whether Article III permits a bankruptcy court, with the consent of the parties, to enter final judgment on a *Stern* claim." 134 S. Ct. at 2170, n.4. The ABA respectfully asserts that allowing the bankruptcy courts to finally adjudicate a non-core or *Stern* claim, with the parties' consent, does not violate Article III. Rather, it is consistent with this Court's precedents and discussion in *Executive Benefits* of the historical underpinnings of consent in bankruptcy proceedings.

Further, the ability of litigants to consent to final adjudications by non-Article III bankruptcy courts serves an important role in the federal court system. If litigants are no longer permitted to continue to consent to have their non-core and *Stern* claims adjudicated in the bankruptcy courts, the district courts' workloads will be impacted significantly, contrary to the Court's statement that its holding in *Stern* was "narrow" and would not "meaningfully chang[e] the division of labor in the current statute." 131 S. Ct. at 2620. Because magistrate judges serve the district courts under substantially similar constitutional

analysis, it may also include in its sweep matters now heard by the magistrate judges, who account for a staggering volume of judicial work. And more cases on the district courts' dockets would necessarily mean more delay for non-bankruptcy cases, as more cases compete for the district courts' time and attention.

With significant considerations of judicial economy and practicality in question, this Court should clarify that there are no separation of powers concerns when litigants consent to non-Article III bankruptcy court adjudications of their *Stern* claims.

ARGUMENT

I. Allowing Bankruptcy Courts, With Litigant Consent, To Hear, Determine, And Enter Final Orders And Judgments In Non-Core and *Stern* Claims Does Not Violate Article III Of The Constitution.

In *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014), this Court reserved the second question on which certiorari has now been granted, stating, "[T]his case does not require us to address whether Article III permits a bankruptcy court, with the consent of the parties, to enter final judgment on a *Stern* claim." 134 S. Ct. at 2170, n.4. The ABA respectfully asserts that allowing the bankruptcy courts to finally adjudicate a non-core claim or a *Stern* claim – "a claim designated for final adjudication in the bankruptcy court as a statutory matter,

but prohibited from proceeding in that way as a constitutional matter," *id.* at 2170, where the parties have consented to final adjudication by the bankruptcy court, does not violate Article III. Rather, it is consistent with this Court's precedents and discussion in *Executive Benefits* of the historical roots of consent in bankruptcy proceedings.

In *Executive Benefits*, the Court began with an overview of modern bankruptcy legislation, and stated that prior to 1978, federal district courts could refer matters within the traditional "summary jurisdiction" of the bankruptcy courts to specialized bankruptcy referees. However, proceedings to augment the bankruptcy estate "implicated the district court's plenary jurisdiction and were not referred to the bankruptcy courts absent both parties' consent." 134 S. Ct. at 2170, citing *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263 (1932), and Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall*, 86 Am. Bankr. L.J. 121, 128 (2012) (hereinafter, "Summary Statutory and Constitutional Theory").

In fact, referral by an Article III court to a non-Article III referee for final determination, upon consent of the litigants was a practice "well known at common law." Ralph Brubaker, *The Constitutionality of Litigant Consent to Non-Article III Bankruptcy Adjudications*, 32 Bankr. L. Letter No. 12, 1, 7 (Dec. 2012) (hereinafter "Constitutionality of Litigant

Consent"), quoting *Heckers v. Fowler*, 2 Wall 123, 131 (1864). As Professor Brubaker stated,

> During the early years of the Republic, federal courts, with the consent of the litigants, regularly referred adjudication of entire disputes to non-Article III referees, masters, or arbitrators, for entry of final judgment in accordance with the referee's report. The Supreme Court, in reviewing challenges to such judgments, implicitly approved those non-Article III adjudications, consulting prior practices of English courts and the contemporaneous practice in the state courts.

Id. at 7. And determinations were "not subject to be set aside and disregarded at the mere discretion of the court" when parties consented to reference of a case to a master or other officer, and the reference was entered as a rule of the court. *Id.* at 7, quoting *Kimberly v. Arms*, 129 U.S. 512, 524 (1889).

As Professor Brubaker opined, the Court approved such non-Article III adjudication with litigant consent without any express congressional authorization as "an inherent feature of Article III courts' judicial powers," and "was equally approving of the practice when Congress expressly authorized federal courts' use of non-Article III referees in the Bankruptcy Act of 1898." *Id.* at 8. Indeed, "the Supreme Court has treated that 1898 Act jurisprudence as Article III precedent and thus has essentially constitutionalized the jurisdictional powers (and limits thereon) of 1898 Act bankruptcy referees." *Id.*

The Bankruptcy Act of 1898 authorized bankruptcy referees to hear and decide summary matters incident to the administration of the bankrupt's estate and to adjudicate creditors' claims against the estate, but did not authorize those referees to hear and decide plenary suits to recover money for the estate. *See A "Summary" Statutory and Constitutional Theory*, 86 Am. Bankr. L.J. at 128-29. However, in *MacDonald*, a 1932 case decided under the 1898 Act (and cited by the *Executive Benefits* Court, 134 S. Ct. at 2170), the Court held that litigants could waive the right to have a plenary suit heard by an Article III court. *MacDonald*, 286 U.S. at 268. In *Cline v. Kaplan*, 323 U.S. 97, 99 (1944), also decided under the 1898 Act, the Court held that "[c]onsent to proceed summarily may be formally expressed" or "may be waived by failure to make timely objection."

In 1978, Congress enacted the Bankruptcy Reform Act ("1978 Act") and, as the *Executive Benefits* Court explained, created the bankruptcy courts of today, eliminating the historical distinction between "summary" and "plenary" jurisdiction, and instead, vesting bankruptcy judges "with all of the 'powers of a court of equity, law, and admiralty,' with only a few limited exceptions." 134 S. Ct. at 2171, quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 55 (1982) (plurality opinion).

In *Northern Pipeline,* the Court held that the 1978 Act's assignment to a bankruptcy judge, for entry of a final order, of a state-law contract claim against a creditor that would not necessarily be resolved in the

equitable claims allowance process violated Article III. However, both the concurring and dissenting opinions emphasized that the defendant Marathon had not consented to having an Article I court decide the debtor's breach of contract action against it. *Id.* at 89-90, 92. *See also, Commodity Futures Trading Commission v. Schor,* 478 U.S. 833, 849 (1986) ("Indeed, the relevance of concepts of waiver to Article III challenges is demonstrated by our decision in *Northern Pipeline,* in which the absence of consent to an initial adjudication before a non-Article III tribunal was relied on as a significant factor in determining that Article III forbade such adjudication.") (citing cases, including *Heckers v. Fowler,* 2 Wall 123 (1864), and *Kimberly v. Arms,* 129 U.S. 512 (1889)).

Further, in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584 (1985), the Court described *Northern Pipeline* as "establish[ing] only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review." (emphasis added).

In response to *Northern Pipeline,* Congress enacted the 1984 Act, which "largely restored the bifurcated jurisdictional scheme that existed prior to the 1978 Act," by dividing all matters that may be referred to the bankruptcy court into "core" and

"non-core" proceedings. *Executive Benefits,* 134 S. Ct. at 2171-72.[8]

Consent, however, remained in the 1984 Act. As stated by the *Executive Benefits* Court, "There is one statutory exception to the rule [for non-core proceedings]: If all parties 'consent,' the statute permits the bankruptcy judge 'to hear and determine and to enter appropriate orders and judgments' as if the proceeding were core." *Id.* at 2172 (quoting § 157(c)(2)).

In *Stern v. Marshall,* 131 S. Ct. 2594 (2011), this Court did not change this constitutional analysis. As explained in *Executive Benefits,* 134 S. Ct. at 2172, the *Stern* Court agreed with the respondent that, without

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[8] "Core" proceedings, as described by the *Executive Benefits* Court, *id.* at 2171, include those "proceedings to determine, avoid, or recover fraudulent conveyances," § 157(b)(2)(H), for which the bankruptcy courts are authorized to "hear and determine" such claims and "enter appropriate orders and judgments" on them. § 157(b)(1). A final judgment entered in a core proceeding is appealable to the district court, § 157(a)(1), which reviews the judgment under the traditional appellate standards. Federal Rule of Bankruptcy Procedure 8013.

"Non-core" proceedings, also as described by the *Executive Benefits* Court, are proceedings that are not core, but are "otherwise related to a case under title 11." The statute authorizes bankruptcy courts to hear the proceeding, and then "submit proposed findings of fact and conclusions of law to the district court." § 157(c)(1). These are reviewed *de novo* by the district court, which then enters any final orders or judgments. *Ibid.*

"*Stern* claims" are statutory "core" claims that constitutionally must be treated like "non-core" claims. *See Executive Benefits*, 134 S. Ct. at 2173.

his consent, Congress could not confer on the bankruptcy court the authority to finally decide the tortious interference counterclaim against him: Congress had therefore violated Article III by vesting the power to adjudicate the counterclaim in the bankruptcy court without his consent.[9]

In *Executive Benefits*, the Court did not reach the constitutional "consent" issue. Instead, the Court resolved a statutory issue by finding that there was no statutory "gap" and declaring that, in the context of *Stern* claims, a "bankruptcy court should hear the proceeding and submit proposed findings of fact and conclusions of law to the district court for de novo review and entry of judgment." *Id.* at 2173.

In *Wellness*, the Court granted certiorari to address the constitutional "consent" issue that the Court reserved in *Executive Benefits*. The ABA respectfully asserts that permitting the bankruptcy courts to hear

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[9] *Stern* held only that when a creditor files a proof of claim he does not consent to being sued on a state law counterclaim in the bankruptcy court unless resolution of the proof of claim necessarily will resolve the counterclaim. 131 S. Ct. at 2620. A creditor's filing of a proof of claim does not evidence its consent because the creditor may have to file a proof of claim to share in a distribution from the debtor's estate. *See Stern*, 131 S. Ct. at 2614-15 ("Pierce did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings. He had nowhere else to go if he wished to recover from Vickie's estate."); *see Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 59 n.14 (1989) ("creditors lack an alternative forum to the bankruptcy court in which to pursue their claims").

and enter final judgments in non-core and *Stern* claims with litigant consent does not (i) implicate institutional concerns for the separation of powers or (ii) violate a litigant's right to an Article III judge. *See also, Schor*, 478 U.S. at 855 ("separation of powers concerns are diminished" and litigants may waive the right to an Article III court, when "the decision to invoke [a non-Article III] forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction" is unaffected).

The ABA asserts that such a clarification would be consistent with the *Executive Benefits* Court's discussion of modern bankruptcy legislation, *id.* at 2170-71, and with the historical foundation on which that legislation stands.[10]

II. The Ability Of Litigants To Consent To Final Adjudications By Non-Article III Courts Serves An Important Role In The Federal Court System.

In determining that *Stern* claims do not create a statutory "gap," the *Executive Benefits* Court stated,

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[10] In the analogous context of magistrate judges, this Court held that a magistrate judge, with express or implied consent of the litigants, may enter a final judgment without any district court review. *Roell v. Withrow*, 538 U.S. 580, 585, 589-91 (2003). The *Roell* Court held that, by allowing magistrate judges to hear and determine matters where consent is inferred, "[j]udicial efficiency is served; the Article III right is substantially honored." *Id.* at 590.

> [W]e noted in *Stern* that removal of claims from core bankruptcy jurisdiction does not "meaningfully chang[e] the division of labor in the current statute." Accepting EBIA's contention that district courts are required to hear all *Stern* claims in the first instance would dramatically alter the division of responsibility set by Congress.

Id. at 2173 n.8 (internal citations omitted) (second alteration original).

The ABA respectfully asserts that a significant part of this "division of labor" includes the ability of the bankruptcy courts to hear and enter final judgments in non-core and *Stern* claims with the consent of the litigants under § 157(c)(2). If bankruptcy courts are not permitted to adjudicate these claims, the district courts' workloads will be impacted in at least three significant ways.

First, *all Stern* claims would have to be reviewed *de novo* by the district court. Second, the reach of *Stern's* "narrow" holding would also extend to *de novo* review of *all* non-core claims

Third, because of the similarity of the statutory schemes of bankruptcy judges and magistrate judges, a determination that litigants may not consent to proceed before non-Article III courts also may extend to matters now heard by magistrate judges.[11] These

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[11] For example, *see* 1 COLLIER ON BANKRUPTCY ¶ 3.03[4] (16th ed. 2011) ("The inspiration for 28 U.S.C. § 157(c)(2) is 28

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similarities include the following: Magistrate and bankruptcy judges are appointed and subject to removal by Article III judges. *Compare* 28 U.S.C. § 631 *with* 28 U.S.C. § 152(a)(1). The "ultimate decision" whether to invoke a magistrate or bankruptcy judge's assistance is made by the district court, subject to veto by the parties. *See Peretz v. United States*, 501 U.S. 923, 937 (1991); 28 U.S.C. § 157(a), (c)(1)-(2). A magistrate and a bankruptcy judge can only preside over a jury trial if specifically designated by an Article III court and with the parties' consent. *Compare* 28 U.S.C. § 636(c)(1) *with* 28 U.S.C. § 157(e). The district court may vacate the reference to a magistrate or withdraw the reference to a bankruptcy judge. *Compare* 28 U.S.C. § 636(c)(4) *with* 28 U.S.C. § 157(d). The entire magistrate and bankruptcy processes take place under the district court's control and jurisdiction. *See Peretz*, 501 U.S. at 937-38; 28 U.S.C. §§ 1334, 151, 152, and 157. Although magistrate judges appear to have more protection from reduction in salary (*compare* 28 U.S.C. § 634(b) *with* 28 U.S.C. § 153(a)), there are provisions designed to limit the outside interests of magistrate and bankruptcy judges to maintain their impartiality. *See Peretz*, 501 U.S. at 937; *compare* 28 U.S.C. § 632(a) *with* 28 U.S.C. § 153(b).[12]

U.S.C. § 636(c)(1), which deals with the powers of United States magistrate judges in like situations.").

[12] This Court has upheld "the use of adjunct factfinders even in the adjudication of constitutional rights – so long as

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Magistrate judges "account for a staggering volume of judicial work" and are "indispensable." *Peretz*, 501 U.S. at 928 & n.5 (*citing Gov't of the Virgin Islands v. Williams*, 892 F.2d 305, 308 (3d Cir. 1989)). In 2013, for example, magistrate judges disposed of 1,179,358 matters (up 2% from 2012), including 15,804 civil cases (up 6% from 2012) concluded with finality by motion, jury trial, or bench trial *with litigant consent*.[13] As of 2013, the United States had 574 magistrate judges and 58 recalled retired magistrate judges, who provide substantial assistance to the 1020 active and senior status district court judges.[14]

Justice Breyer noted in *Stern* that "the volume of bankruptcy cases is staggering." *Stern*, 131 S. Ct. at 2630 (dissent). In 2013, a total of 44,555 adversary proceedings were filed (a 17% reduction from 2012 and 20% percent below the 2009 total) and 56,843

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those adjuncts were subject to sufficient control by an Art. III district court." *N. Pipeline*, 458 U.S. at 78-79 (plurality). Although a bankruptcy judge cannot be considered an "adjunct" of the district court with respect to its powers over "core" proceedings for which the bankruptcy judge may enter final orders, *Stern*, 131 S. Ct. at 2618-19, the use of bankruptcy judges is similar to the use of magistrate judges with respect to non-core claims and *Stern* claims.

[13] http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-magistrate-judges.aspx.

[14] http://www.uscourts.gov/Statistics/JudicialBusiness/2013/appointments-magistrate-judges.aspx#table13.

were pending (down 13% from 2012).[15] If all non-core and *Stern* claims asserted in those adversary proceedings must be heard *de novo* in the district court, Article III judges' workload would increase dramatically, resulting in increased delay as cases compete for the district courts' time and attention. Accordingly, the ABA submits that, where, as here, considerations of judicial economy and practicality are not in conflict with constitutional principles, the impact on the courts and both bankruptcy and non-bankruptcy litigants should be considered.

The ABA therefore urges this Court to clarify that Article III of the United States Constitution permits the bankruptcy courts, upon consent of the parties, to hear, determine and enter final orders and judgments in non-core and *Stern* claims, under 28 U.S.C. § 157(c)(2).

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[15] http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-bankruptcy-courts.aspx.

CONCLUSION

For the foregoing reasons, *amicus curiae* American Bar Association requests that the judgment of the court of appeals be reversed.

Dated: September 16, 2014

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-935

IN THE

Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LIMITED, RALPH OATS, AND CATHY OATS,

Petitioners,

v.

RICHARD SHARIF,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE AMERICAN COLLEGE OF BANKRUPTCY AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae the American College of Bankruptcy was founded in 1989 as an honorary association of bankruptcy and insolvency professionals. Membership is by invitation only. The College's eight hundred fellows include individuals associated with all facets of bankruptcy practice: commercial and consumer bankruptcy attorneys, corporate turnaround advisers, United States Trustees, bankruptcy trustees, investment bankers, insolvency accountants, law professors, judges, government officials, appraisers, and others involved in all aspects of the bankruptcy and insolvency community.

The College has typically avoided intervening in legal and political controversies. It has filed an amicus brief only once before, in *Executive Benefits Insurance Agency* v. *Arkison*, 134 S. Ct. 2165 (2014). In *Executive Benefits*, this Court was presented with, but ultimately did not resolve, one of the issues presented in this case: whether, and under what circumstances, bankruptcy courts may enter final judgment in "non-core" matters (that is, matters of private right)[2] with the litigants' consent.

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[1] Letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

[2] In this brief, except where otherwise indicated, amicus uses the terms "core" and "non-core" to denote matters as to which a bankruptcy court may and may not, respectively, enter final judgment consistent with the Constitution. *See Executive Benefits*, 134 S. Ct. at 2171 n.7 ("In using the term 'core'" in the Judiciary Code, Congress intended "a description of those claims that fell within the scope of the historical bankruptcy court's power.").

As the College explained in its brief in *Executive Benefits*, bankruptcy courts' ability to enter final judgment in non-core proceedings with the parties' consent is critical to the effective and efficient administration of bankruptcy cases and consistent with longstanding historical practice. A holding that Article III does not permit bankruptcy courts to adjudicate such claims with consent would throw the bankruptcy system into disarray—while also requiring the invalidation of key aspects of the magistrate system and thus undermining the effective administration of litigation more broadly.

As a non-partisan, diverse group of experienced bankruptcy professionals with expertise across all dimensions of bankruptcy and insolvency, the College has a substantial interest in the questions presented and a unique perspective on their proper resolution that differs from that of either of the parties. The College accordingly submits this brief to provide the Court with that perspective.

SUMMARY OF ARGUMENT

This Court granted certiorari in this case to resolve two questions: (1) whether petitioner Wellness International Network's claim against the respondent, debtor Richard Sharif, is a "core" bankruptcy proceeding as to which the bankruptcy court may constitutionally enter final judgment irrespective of the parties' consent; and (2) if not, whether the bankruptcy court could nonetheless constitutionally enter final judgment on that claim *with* the parties' express or implied consent. The court of appeals erred in its analysis of both questions, although not in every instance for the precise reasons Wellness articulates.

Wellness's claim against the debtor is appropriately viewed as a proceeding to determine whether certain property is owned by the debtor and thus properly included in the bankruptcy estate. *See* 11 U.S.C. §541(a). As such, Wellness's claim is at the very heart of the bankruptcy process, in which the bankruptcy court exercises *in rem* jurisdiction over all the property of the estate and adjudicates the competing claims of the debtor and its creditors to that property. *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 369-370 (2006). Put differently, Wellness's claim is part of the "restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality opinion). Wellness's claim is thus very different from the common-law breach-of-contract suit against a third party at issue in *Marathon*, *see id.* at 71-72, or the common-law tort counterclaim at issue in *Stern* v. *Marshall*, *see* 131 S. Ct. 2594, 2611-2615 (2011). Indeed, nothing could be more central to the bankruptcy process than the marshaling and distribution of the debtor's assets, at issue here.

The court of appeals wrongly concluded that the bankruptcy court could not constitutionally enter final judgment on Wellness's claim against the debtor. The court did so both because it misapprehended the nature of Wellness's claim and because it wrongly believed that the bankruptcy court's need to apply state law to resolve the claim rendered it non-core. Wellness's claim was asserted against the debtor and sought a declaration that the debtor had a legal or equitable interest in certain property. To be sure, in order to determine whether the debtor has such a property interest, a bankruptcy court must apply state law. But many core bankruptcy matters require the application of state

law. Most notably, the resolution of creditors' claims against the bankruptcy estate—one of the bankruptcy court's primary functions—requires the court to look to the underlying state law that typically governs the merits of those claims. *See* 11 U.S.C. §502(b)(1); *Butner* v. *United States*, 440 U.S. 48, 55 (1979). Claims-allowance proceedings may nonetheless be finally adjudicated by the bankruptcy court because they are part of the core bankruptcy function of distributing the *res* among competing claimants. So too here.

The Court accordingly need not reach the question of consent in this case. Were the Court to do so, however, it should hold that Article III poses no barrier to a bankruptcy court's entering final judgment in matters of private right with the parties' consent. This Court explained in *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833 (1986), that Article III, §1 serves to protect "primarily personal, rather than structural, interests," and that such personal rights are waivable. *Id.* at 848-849. To be sure, Article III, §1 also protects against encroachment by the political branches on the judicial branch—and arguably against improper delegation by the judicial branch of its own duties—and "the parties cannot by consent cure" such structural flaws. *Id.* at 851. But no such encroachment or improper delegation is present here, given that bankruptcy courts are units of the district court and can adjudicate matters only by reference from the district court that may at any time be withdrawn. Accordingly, the parties may give their consent to entry of final judgment by the bankruptcy court—just as they may to entry of final judgment by a federal magistrate.

Under the Federal Rules of Bankruptcy Procedure, however, such consent may not be implied. Rule 7012(b) plainly states that "[i]n non-core proceedings

final orders and judgments shall not be entered on the bankruptcy judge's order except with the *express* consent of the parties." Fed. R. Bankr. P. 7012(b) (emphasis added). *Roell* v. *Withrow*, 538 U.S. 580 (2003), which interpreted a different statutory scheme and addressed very different facts, provides no basis to rewrite the rule. It is nonetheless possible that a party might forfeit an argument that Rule 7012(b) was violated by failing to raise it in a timely manner on appeal. Amicus takes no position as to how these principles apply to this case.

ARGUMENT

I. CONSTITUTIONAL AND STATUTORY BACKGROUND

Bankruptcy's central purpose is to identify and marshal the debtor's assets that become part of the bankruptcy estate and to distribute those assets among creditors. *See, e.g.*, *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363-364 (2006). By granting the bankruptcy court exclusive *in rem* jurisdiction over the debtor's property and the authority to adjudicate claims to that property, bankruptcy eliminates the race to the courthouse that would otherwise occur when an insolvent debtor lacks sufficient assets to satisfy all creditors. Bankruptcy courts have historically possessed, and may constitutionally exercise, authority to enter final judgment in matters at the core of this process of assembling the bankruptcy estate and adjudicating competing claims to that estate.

1. The Bankruptcy Act of 1898 divided bankruptcy proceedings into "summary" proceedings, which were generally conducted before non-Article III "referees," and "plenary" proceedings conducted in Article III (or state) courts. Act of July 1, 1898, ch. 541, §22(a),

30 Stat. 544, 552 (repealed 1979); *see also Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 52-53 (1982) (plurality opinion). "[M]atters within the traditional 'summary jurisdiction' of bankruptcy courts" that "could [be] refer[red] ... to specialized bankruptcy referees" "covered claims involving 'property in the actual or constructive possession of the [bankruptcy] court,' *i.e.*, claims regarding the apportionment of the existing bankruptcy estate among creditors." *Executive Benefits Ins. Agency* v. *Arkison*, 134 S. Ct. 2165, 2170 (2014) (citation omitted). "Proceedings to augment the bankruptcy estate, on the other hand, implicated the district court's plenary jurisdiction and were not referred to the bankruptcy courts absent both parties' consent." *Id.*; *see also MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263, 266-268 (1932).

Katchen v. *Landy*, 382 U.S. 323 (1966), illustrates the point. In *Katchen*, this Court held that bankruptcy courts could enter final judgment in preference suits—suits to bring back into the estate money preferentially paid to certain creditors during the period just before the bankruptcy—against creditors who had filed claims in the bankruptcy case. *Id.* at 327-328. The Court rejected the creditor's argument that being required to proceed in bankruptcy court without his consent violated his constitutional rights, explaining that "bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession"—that is, property of the bankruptcy estate. *Id.* at 336. Because the statute required the adjudication of preference claims against creditors before their claims against the estate could be determined, the preference action became part of the claims-allowance process, and thus within the bank-

ruptcy court's authority to determine. *See also* *Langenkamp* v. *Culp*, 498 U.S. 42, 45 (1990) (per curiam) (same under Bankruptcy Code).

2. In 1978, Congress "substantially expanded" bankruptcy courts' authority. H.R. Rep. No. 95-595, at 13 (1977). The new Bankruptcy Code abolished the statutory distinction between summary and plenary proceedings and permitted newly constituted bankruptcy courts to hear and determine "all civil proceedings arising under [the Bankruptcy Code] or arising in or related to cases under [it]." 28 U.S.C. §1471(b) (repealed 1984); *Marathon*, 458 U.S. at 54 (plurality opinion). Although the 1978 Code permitted bankruptcy courts to enter final judgment in any proceeding within federal bankruptcy jurisdiction, bankruptcy judges were not given the Article III protections of lifetime tenure and undiminished compensation.

3. In *Marathon*, this Court held that broad grant of power to a non-Article III court unconstitutional. 458 U.S. at 87 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in judgment). *Marathon* involved a state-law breach-of-contract action brought by a debtor against a third-party non-creditor. The plurality concluded that such an action was a matter of "private right," rather than "public right," and thus could not constitutionally be decided by a non-Article III tribunal absent the parties' consent. While the "divided Court" was unable to agree on the precise scope of Article III's limitations, a majority of the Court held that "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas* v. *Union Carbide*

Agric. Prods. Co., 473 U.S. 568, 584 (1985) (citing *Marathon*, 458 U.S. at 84).

At the same time, the Court made clear that its holding did not require that all bankruptcy proceedings be adjudicated by Article III courts. The plurality explained that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power," "may well be a 'public right'" that Congress could remit to a non-Article III tribunal for decision. *Marathon*, 458 U.S. at 71. And it emphasized that such proceedings "must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages" at issue in *Marathon*, which served merely "to augment [the debtor's] estate" and which the debtor could assert "[e]ven in the absence of the federal scheme." *Id.* at 71, 72 n.26. The concurring Justices agreed that "[n]one of the [Court's] cases has gone so far as to sanction the type of adjudication to which Marathon will be subjected," but similarly recognized that "different powers granted under [the Bankruptcy] Act [of 1978] might be sustained under the 'public rights' doctrine." *Id.* at 91.

4. In response to *Marathon*, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. While rejecting proposals to establish an Article III bankruptcy court, Congress sought to satisfy this Court's instruction that "'the essential attributes' of the judicial power" be retained in the Article III court. *Marathon*, 458 U.S. at 87 (plurality opinion). Accordingly, while the 1984 Act did not alter the scope of bankruptcy jurisdiction set out in the 1978 Code, it replaced the independent bankruptcy court established in the 1978 Code with an entity that would be a "unit" of the district courts and would hear bankruptcy proceedings only by refer-

ral from the district courts. 28 U.S.C. §151. Specifically, district courts "may provide that any or all cases under [the Bankruptcy Code] and any or all proceedings arising under [the Bankruptcy Code] or arising in or related to a case under [the Code] shall be referred to the bankruptcy judges for the district." *Id.* §157(a). Moreover, "[t]he district court may withdraw, in whole or in part, any case or proceeding referred [to the bankruptcy court], on its own motion or on timely motion of any party, for cause shown." *Id.* §157(d).[3]

In addition, the 1984 Act drew a distinction—at the heart of the statute's scheme for constitutionally allocating authority between district and bankruptcy courts—between "core" and "non-core" bankruptcy proceedings. "In using the term 'core,' Congress tracked the *Northern Pipeline* plurality's use of the same term as a description of those claims that fell within the scope of the historical bankruptcy court's power." *Executive Benefits*, 134 S. Ct. at 2171 n.7. The Act accordingly authorized bankruptcy courts to "hear and determine ... all core proceedings arising under [the Bankruptcy Code], or arising in a case under [the Bankruptcy Code]" and to "enter appropriate orders and judgments" in such proceedings, subject only to ordinary appellate review. 28 U.S.C. §157(b)(1). By contrast, "[n]on-core proceedings ... concern aspects of the bankruptcy case that *Marathon* barred non-Article III judges from determining on their own." *In re Arnold Print Works, Inc.*, 815 F.2d 165, 167 (1st Cir. 1987)

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[3] Withdrawal of a proceeding from the bankruptcy court is mandatory "if the [district] court determines that resolution of the proceeding requires consideration of both [the Bankruptcy Code] and other laws of the United States regulating organizations or activities affecting interstate commerce." 28 U.S.C. §157(d).

(Breyer, J.). Absent the parties' consent, *see* 28 U.S.C. §157(c)(2), in non-core proceedings bankruptcy courts may only enter proposed findings of fact and conclusions of law, subject to de novo review by the district court, *id.* §157(c)(1).

5. In *Stern*, this Court held that Congress's efforts in Section 157 to remedy the constitutional flaw identified in *Marathon* had failed "in one isolated respect." 131 S. Ct. at 2620. In the 1984 Act, Congress enumerated certain examples of core proceedings—proceedings that it believed the bankruptcy courts could constitutionally hear and determine without the parties' consent. 28 U.S.C. §157(b)(2). It included in the list of core proceedings "counterclaims by the estate against persons filing claims against the estate." *Id.* §157(b)(2)(C).

This Court held that, as applied to the counterclaim at issue in *Stern*—a state-law tort claim by the debtor against a creditor "that is not resolved in the process of ruling on a creditor's proof of claim"—§157(b)(2)(C) was unconstitutional. *Stern*, 131 S. Ct. at 2620. As in *Marathon*, the debtor's counterclaim was a cause of action derived from state common law and was related to her bankruptcy case only because, if she were to prevail, it would increase the estate's assets. *Id.* at 2614-2615.

As in *Marathon*, however, this Court made clear that its "narrow" ruling did not call into question bankruptcy courts' constitutional authority to enter final judgments in matters that are integral to the core restructuring process. *Stern*, 131 S. Ct. at 2617, 2620. To the contrary, the Court distinguished, and implicitly reaffirmed, its prior decisions in *Katchen* and *Langenkamp* holding that a bankruptcy court could determine a preference claim by the estate against a cred-

itor that had filed a proof of claim. *See id.* at 2616-2617; *see also Granfinanceria, S.A.* v. *Nordberg*, 492 U.S. 33 (1989) (holding that there is no jury-trial right, and hence no obstacle to proceeding in a non-Article III tribunal, in a fraudulent-transfer action against a creditor that has filed a claim against the estate, but that the same is not true in an action against a party that has not filed a claim).

* * *

In sum, this Court's precedent has distinguished between traditional "'common law ... claims brought by a [debtor] to augment the bankruptcy estate'"—like the contract claim in *Marathon*, the fraudulent-transfer claim in *Granfinanceria*, and the tort claim in *Stern*—and "actions ... that seek 'a pro rata share of the bankruptcy res,'" like those in *Langenkamp* and *Katchen*. *Stern*, 131 S. Ct. at 2614, 2618. "Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case." *Id.* at 2618. Rather, the "question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.* In those circumstances, there is no constitutional obstacle to the bankruptcy court's entering final judgment even absent the parties' consent.

II. A Bankruptcy Court May Constitutionally Enter Final Judgment On The Claim At Issue Here Even Without The Parties' Consent

In this case, a federal district court entered a money judgment in favor of petitioner Wellness against respondent Sharif. Pet. App. 2a. Sharif then filed for chapter 7 bankruptcy. *Id.* Wellness filed an adversary proceeding against Sharif, individually and as trustee of the "Soad Watter Trust." JA5-22. Counts I-IV of the

adversary complaint objected to the discharge of the debt arising from the judgment against Sharif. JA13-19. Count V sought a declaration that assets Sharif had represented to the bankruptcy court were held by the "Soad Watter Trust" were in fact Sharif's own assets, that is, that "the Soad Watter Living Trust is the alter ego of Debtor." JA19-21. The bankruptcy court ordered Sharif to respond to Wellness's discovery requests. Pet. App. 2a. When Sharif failed to do so, the bankruptcy court entered default judgment in favor of Wellness. *Id.* On appeal, the district court affirmed. *Id.* 3a.

The court of appeals concluded that Wellness's declaratory judgment claim against Sharif "is indistinguishable from the tortious-interference counterclaim in *Stern*" or "the contract claim in *Northern Pipeline*." Pet. App. 48a. The court reasoned that "[t]he dispute is between private parties," "[i]t stems from state law rather than a federal regulatory scheme," and "it is intended only to augment the bankruptcy estate." *Id.* The better interpretation of Wellness's claim, however, is that it sought not to augment the bankruptcy estate but to ascertain and marshal the estate's existing assets for distribution to creditors—the core function of the bankruptcy process. For the reasons set out below, such a claim "stems from the bankruptcy itself," *Stern*, 131 S. Ct. at 2618, and is within the bankruptcy court's power to adjudicate regardless of the parties' consent.

A. Proceedings To Determine Whether Property Is Part Of The Bankruptcy Estate Are Core Bankruptcy Proceedings That May Be Finally Decided By The Bankruptcy Court

Like claims-allowance proceedings, proceedings to determine whether certain property is part of the

bankruptcy estate are "'integral to the restructuring of the debtor-creditor relationship,'" *Stern*, 131 S. Ct. at 2617, and thus matters that bankruptcy courts may constitutionally hear and determine.

The Bankruptcy Code provides that the commencement of a bankruptcy case "creates an estate" that includes (with certain exceptions) "all legal or equitable interests of the debtor in property," "wherever located and by whomever held." 11 U.S.C. §541(a). A bankruptcy filing also creates an automatic stay barring creditors from pursuing claims against that property or against the debtor, so that the estate may be protected, and its value preserved, for the benefit of all creditors. *Id.* §362(a), (c). Absent relief from the automatic stay, creditors' recourse is thus limited to the bankruptcy estate. Creditors may file proofs of claim against the estate, *id.* §501, which are allowed or disallowed by the bankruptcy court, *id.* §502. Following satisfaction of any secured or priority claims, estate property is then distributed ratably among creditors having allowed claims. *Id.* §§725, 726, 1123, 1129. At the conclusion of the bankruptcy process, the debtor may (again, with certain exceptions) obtain a discharge of pre-bankruptcy debts, *id.* §§727(a)(2), 1141(d), which permanently enjoins creditors from collecting those debts from the debtor, *id.* §524(a).

Delineating and marshaling the bankruptcy estate are thus fundamental to the core bankruptcy process of restructuring debtor-creditor relations. "Critical features of every bankruptcy proceeding are the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts." *Katz*, 546 U.S. at

363-364. Indeed, "[b]ankruptcy jurisdiction, as understood today and at the time of the [Constitution's] framing, is principally *in rem* jurisdiction" "'premised on the debtor and his estate.'" *Id.* at 369, 370; *see also Straton v. New*, 283 U.S. 318, 320-321 (1931) ("The purpose of the Bankruptcy Act ... is to place the property of the bankrupt, wherever found, under the control of the court, for equal distribution among the creditors.").

Determining whether property is part of the estate is thus well within the constitutional authority of bankruptcy courts to decide by final order. A proceeding to determine whether property belongs to the debtor—and hence to his or her bankruptcy estate—unquestionably "stems from the bankruptcy itself." *Stern*, 131 S. Ct. at 2618. It is a proceeding "derived from ... bankruptcy law"—§541 of the Bankruptcy Code—that does not "exist[] [outside of] any bankruptcy proceeding." *Id.* Moreover, determining what property is included in the estate is integral to the "claims allowance process." *Id.* The ultimate aim of the claims-allowance process, after all, is to distribute the estate to the debtor's creditors, as allocated in accordance with their respective claims.

Bankruptcy courts' constitutional authority to adjudicate the claims-allowance process, repeatedly recognized by this Court, is thus merely one aspect of the broader overall authority that bankruptcy courts have traditionally exercised over the bankruptcy estate. As *Katchen* explained, "'[t]he whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*,' and thus falls within the principle ... that bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property within their possession." 382 U.S. at 329-330 (citation omitted); *see also Granfinanceria*, 492

U.S. at 57 (*Katchen* "turned ... on the bankruptcy court's having 'actual or constructive possession' of the bankruptcy estate, and its power and obligation to consider objections by the trustee in deciding whether to allow claims against the estate" (citation omitted)).

Indeed, adjudication of interests in the bankruptcy estate has historically been handled in summary proceedings by non-Article III courts. At the time of the Constitution's framing, English bankruptcy law was a matter of statute, not the common law. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 575-576, 590 (1998). Pursuant to the English bankruptcy statutes, bankruptcy matters were generally adjudicated by non-judicial commissioners, unless a party to the bankruptcy proceeding sought review in a court of law or equity. *Id.* at 573-578 & n.57. The commissioners determined most issues arising in the bankruptcy proceeding, including those involving property of the estate, the allowance of creditors' claims, the pro rata distribution of the estate among creditors, and the discharge of the debtor's debts. *Id.* at 573, 575-599. This summary bankruptcy procedure, conducted primarily outside the more formal judicial process of the law and equity courts, facilitated the quick and inexpensive adjustment of the relationship between an insolvent debtor and his creditors. *Id.* at 574, 596.

The first U.S. bankruptcy law, the Bankruptcy Act of 1800, "was in many respects a copy of the English bankruptcy statute then in force. ... Like the English statute, [it] permitted bankruptcy commissioners, on appointment by a federal district court, ... to seize and collect the debtor's assets; to examine the debtor and any individuals who might have possession of the debtor's property; and to issue a 'certificate of discharge'

once the estate had been distributed." *Katz*, 546 U.S. at 373-374 (citations omitted). The Act gave non-Article III bankruptcy commissioners broad authority over the debtor's bankruptcy proceedings and the estate, including the power to "take into their possession, all the estate, real and personal, of every nature and description to which the said bankrupt may be entitled, either in law or equity," Act of April 4, 1800, ch. 19, § 5, 2 Stat. 19, 23; to "admit the creditors of such bankrupt to prove their debts," *id.* §6, 2 Stat. at 23; and to "order ... said bankrupt's estate ... to be ... divided among such of the bankrupt's creditors as have duly proved their debts under such commission," *id.* §29, 2 Stat. at 29.

As discussed above, the Bankruptcy Act of 1898 likewise granted non-Article III bankruptcy referees summary jurisdiction to determine what property was part of the estate. In *Mueller* v. *Nugent*, 184 U.S. 1 (1902), for instance, this Court held that a bankruptcy referee had the power to determine whether property held by a third party was "the property of the bankrupt ... and ... part of [the bankruptcy] estate," and to order its turnover. *Id.* at 4, 12-15.

Of particular relevance here, bankruptcy referees could enter final orders determining that property held by the debtor's alter ego belonged to the debtor and its estate. For example, in *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U.S. 215 (1941), this Court held that a bankruptcy referee had "jurisdiction ... by summary proceedings" to enter "a final order" determining that "the property of the [debtor's] corporation was property of the bankrupt estate," and hence that the referee's order could not be collaterally attacked by a creditor of the corporation seeking priority against the corporate assets. *Id.* at 217-219. The referee in *Sampsell* determined that the property nominally held by the corpora-

tion was property of the estate because it found "'the corporation[] to be the alter ego of the bankrupt,'" *Imperial Paper & Color Corp.* v. *Sampsell*, 114 F.2d 49, 52 (9th Cir. 1940), and "'nothing but a sham and a cloak' devised by [the debtor] 'for the purpose of preserving and conserving his assets' for the benefit of himself and his family" and "hindering, delaying and defrauding his creditors," 313 U.S. at 217. *See also e.g.*, *In re Eufaula Enters., Inc.*, 565 F.2d 1157, 1160-1161 (10th Cir. 1977) (holding that "the referee in bankruptcy properly exercised summary jurisdiction in requiring the state-appointed receiver to turn over [a trust's] assets to the trustee of [the debtor]" where it found that "[the trust] was an instrumentality or alter ego of [the debtor]").

Courts have likewise held under the current Bankruptcy Code that bankruptcy courts may, consistent with Article III, enter final judgments determining whether property—including property purportedly owned by the debtor's alter ego—is part of the debtor's bankruptcy estate. *See, e.g.*, *In re Johnson*, 960 F.2d 396, 400-402 & n.3 (4th Cir. 1992) (bankruptcy court could enter final judgment determining what portion of debtor's property was held in constructive trust for investors as matter "intimately tied to the traditional bankruptcy functions and estate"); *In re Gladstone*, 513 B.R. 149, 156-159 (Bankr. S.D. Fla. 2014) (bankruptcy court could finally determine action to declare that property held by debtor's alter-ego corporations "are actually assets of the Debtor" and "accordingly property of the estate under 11 U.S.C. §541"; the action "'stems from the bankruptcy itself'" because "determin[ing] what is and is not property of the estate" is "a decision central to the mission of the bankruptcy court").

B. The Court of Appeals Misapprehended The Nature of Wellness's Claim

The court of appeals nonetheless held that the bankruptcy court lacked constitutional authority to enter final judgment on what it called Wellness's "alter ego" claim against the debtor, deeming that claim "indistinguishable" from the contract and tort claims in *Marathon* and *Stern*. Pet. App. 48a. The court of appeals' characterization of Wellness's claim, however, misapprehended the nature of the proceeding before the bankruptcy court. The better reading of Wellness's claim is that it merely sought a declaratory judgment that property the debtor claimed he held in trust for another was, in reality, his own property, and hence property of the debtor's bankruptcy estate under the Bankruptcy Code. As discussed above, the bankruptcy court could constitutionally decide that question.

The court of appeals may have been led astray by the term "alter ego," which has been applied to two different types of claims. *See Gladstone*, 513 B.R. at 156-159. An "alter ego" claim may refer to a claim seeking to hold a third party liable for a debt the debtor owes to a creditor. Such a claim may seek, for instance, to "pierce the corporate veil," based on the injustice to the creditor of maintaining the separateness of the third party's assets from the debtor's assets. *See, e.g.*, *International Fin. Servs. Corp.* v. *Chromas Techs. Can., Inc.*, 356 F.3d 731, 734, 736-737, 740 (7th Cir. 2004) (remanding to district court to hold sister corporation liable for debt owed to creditor of debtor corporation if court found sister corporation to be debtor's alter ego).

That kind of "alter ego" claim against a third party, seeking to hold that party liable for the debtor's debts, may well be a matter that, absent the parties' consent,

requires adjudication by an Article III court. Such a claim would resemble a fraudulent-transfer suit against a non-creditor: It would arise under the common law between private parties and would seek to augment the bankruptcy estate rather than to identify and marshal the existing assets in the estate. *See Stern*, 131 S. Ct. at 2618; *Granfinanceria*, 492 U.S. at 55-56.

The claim Wellness asserted here, however, is better understood as the second kind of "alter ego" claim—that is, a claim that a nominal third party has no substantive existence separate from the debtor, and that property purportedly held by the third party is, therefore, the debtor's own property. *See Gladstone*, 513 B.R. at 157-159. Because this kind of "alter ego" claim asserts that the nominal third parties "are not truly separate entities" and "have no purpose other than to hide assets held entirely for the Debtor's benefit," the "gravamen of the complaint is ... that all assets held in the names of the various [third parties] are actually assets of the Debtor," and thus "'interests of the debtor in property' [under] §541(a)(1)." *Id.* at 159. A suit against the debtor to determine what property the debtor owns for purposes of delineating the estate under §541 of the Bankruptcy Code—quite unlike a suit against a third party seeking to bring the third party's assets into the estate on a common-law theory of liability—is integral to the restructuring of debtor-creditor relations and may be determined by the bankruptcy court.

While Wellness's complaint did not expressly invoke §541, that is the substantive relief it sought: a declaratory judgment "as to the Debtor's ownership interest in property purportedly held in the name of the [trust]." JA19. Wellness alleged that the "Debtor has continuously concealed property that he admitted ... he owned by claiming that such property is currently

owned by the [trust]"; that "[t]o the extent that the [trust] exists," it was "a mere tool or business conduit of Debtor," that "Debtor ... exercises complete control over the trust and its assets," and "that the separateness of Debtor and the [trust] ... has ceased"; and that Wellness was therefore "entitled to a declaratory judgment that the [trust] is the alter ego of the Debtor and that all assets of the trust should be treated as part of Debtor's estate." JA35, 36, 44.

The court of appeals was thus wrong to conclude that Wellness's claim was a "state-law claim ... wholly independent of federal bankruptcy law." Pet. App. 51a. An action to determine the property of the estate under §541 is an action "derived from [and] dependent upon [federal] bankruptcy law." *Stern*, 131 S. Ct. at 2618. That state law might play a role in the analysis of the claim is irrelevant. Indeed, "the basic federal rule in bankruptcy is that state law governs the substance of claims, Congress having generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Travelers Cas. & Sur. Co. of Am.* v. *Pacific Gas & Elec. Co.*, 549 U.S. 443, 450-451 (2007) (internal quotation marks omitted). In the claims-allowance process, for example, the bankruptcy court will typically look to state law to determine a claim's validity. *See* 11 U.S.C. §502(b)(1) (providing for disallowance of claims that are "unenforceable ... under any agreement or applicable law"); *Butner* v. *United States*, 440 U.S. 48, 55 (1979) (noting that property interests in bankruptcy are typically created and defined by state law). But the claims-allowance procedure is nonetheless one that "stems from the bankruptcy itself" for Article III purposes. The same is true here.

III. Bankruptcy Courts May "Hear And Determine" Non-Core Claims With The Consent Of The Parties

Because the bankruptcy court could constitutionally enter final judgment on Wellness's claim, this Court need not reach the question of consent. Were the Court to disagree and reach that question, however, it should hold that a bankruptcy court may constitutionally hear and determine non-core matters that would otherwise require an Article III tribunal with the consent of the parties. That conclusion is most consistent with this Court's Article III jurisprudence, which holds that absent meaningful encroachment on or diminution of the prerogatives of the judicial branch, the parties' consent to non-Article III resolution of a private-right dispute does not offend the separation of powers.

Under the Federal Rules of Bankruptcy Procedure, however, consent to bankruptcy court adjudication of a non-core matter must be "express." Fed. R. Bankr. P. 7012(b). There is no reason for this Court to hold that the rule means anything other than what it says.

A. Litigants May Consent To A Bankruptcy Court's Entry Of Final Judgment On Matters Of Private Right

A bankruptcy court's adjudication of private-right controversies with the litigants' consent, as Congress authorized in §157(c)(2) of the Judiciary Code, does not offend Article III.

1. In *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833 (1986), this Court explained that Article III, §1 serves to protect "primarily personal, rather than structural, interests." *Id.* at 848. "[A]s a personal right, Article III's guarantee of an impartial

and independent federal adjudication is subject to waiver, just as are other personal constitutional rights." *Id.*

To be sure, Article III, §1 also plays a structural role, "safeguard[ing] the role of the Judicial Branch in our tripartite system by barring congressional attempts ... [to] 'emasculat[e]' constitutional courts, and thereby preventing 'the encroachment or aggrandizement of one branch at the expense of the other.'" *Schor*, 478 U.S. at 850 (citation omitted). It may also restrain the judicial branch from abdicating its own core constitutional duties. *See, e.g., Peretz* v. *United States*, 501 U.S. 923, 955-956 (1991) (Scalia, J., dissenting). "To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty[.]" *Schor*, 478 U.S. at 850-851. The question, therefore, is whether a particular grant of authority to a non-Article III tribunal creates such a significant incursion on the judicial branch, or abdication of that branch's authority, that it cannot constitutionally be tolerated even if the litigants consent.

This Court has never previously identified such a case. When it has struck down a grant of power to a non-Article III tribunal, it has always been in cases in which litigants had no option to proceed before a constitutional court. In *Marathon*, for example, this Court's holding was that "Congress may not vest in a non-Article III court the power to adjudicate, render a final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review." *Thomas*, 473 U.S. at 584 (emphasis added). *Stern*, too, struck down §157(b)(2)(C) as applied in that case, and distinguished *Schor*, in part because the objecting creditor "did not truly consent to resolution of

[the debtor's] claim in the bankruptcy court proceedings." 131 S. Ct. at 2614.

Similarly, consent has long been the lynchpin of the magistrate system, whose constitutionality has not been impugned by this Court. *Compare Gomez* v. *United States*, 490 U.S. 858, 872 (1989) (holding, on constitutional avoidance grounds, that Congress "did not contemplate inclusion of jury selection in felony trials among a magistrate's additional duties" where the defendant did not consent), *with Peretz*, 501 U.S. at 932 (holding that a magistrate may constitutionally exercise that duty where the defendant did consent). "[T]he litigant's consent makes the crucial difference." *Peretz*, 501 U.S. at 933. As a personal right, the defendant's right to have an Article III judge preside over voir dire is waivable. *Id.* at 936-937. Moreover, a magistrate's presiding over jury selection with the defendant's consent does not offend the "structural protections provided by Article III" because "[m]agistrates are appointed and subject to removal by Article III judges"; "[t]he 'ultimate decision' whether to invoke the magistrate's assistance is made by the district court, subject to veto by the parties"; and "'the entire process takes place under the district court's total control and jurisdiction.'" *Id.*[4]

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[4] Indeed, this Court has long approved similar practices in an array of contexts. *See Kimberly* v. *Arms*, 129 U.S. 512, 524 (1889) (approving practice in chancery courts in which "the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law" and concluding that decision of master had same effect as final judgment from federal court); *Newcomb* v. *Wood*, 97 U.S. 581, 583 (1878) ("The power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it, is incident to all judicial administration, where the right

The same is true here. The 1984 Act did not "'transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts." *Schor*, 478 U.S. at 850. To the contrary, the Act carefully and deliberately ensured that Article III district courts would exercise a full measure of control over bankruptcy proceedings. *Cf. id.* at 857 (examining the "congressional plan at issue and its practical consequences" before upholding the grant of authority). Bankruptcy courts are "unit[s]" of the district courts, 28 U.S.C. §151, and bankruptcy judges are appointed—and may be removed—by Article III judges, *id.* §152(a), (e). The district courts enjoy extensive supervisory authority over the administration of bankruptcy proceedings: Bankruptcy courts hear no matter unless the district court has made an appropriate reference, *id.* §157(a); the district court may withdraw that reference for cause at any time, *id.* §157(d); and the district court *must* withdraw the reference of any proceeding that requires meaningful interpretation of a federal statute (other than the Bankruptcy Code) affecting interstate commerce, *id.* And, of course, all bankruptcy court judgments are reviewable by Article III courts. *Id.* §158. While these provisions are inadequate to render constitutional bankruptcy courts' *nonconsensual* entry of final judgment in non-core proceedings, *see*

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exists to ascertain the facts as well as to pronounce the law. *Conventio facit legem.* In such an agreement there is nothing contrary to law or public policy."); *Heckers* v. *Fowler*, 69 U.S. (2 Wall.) 123, 127, 131 (1865) (upholding referrals of civil matters for adjudication by non-Article III entities where "the parties agreed in writing to refer the cause to a referee 'to hear and determine the same and all the issues therein, with the same powers as the court'" and noting that the "[p]ractice of referring pending actions under a rule of court, by consent of parties, was well known at common law").

Stern, 131 S. Ct. at 2619, they demonstrate that the 1984 Act does not strip the judicial power of the United States from constitutional courts in a way that raises concerns consent cannot address.

Like bankruptcy courts, magistrates enter final judgments with the consent of the litigants in proceedings that would otherwise be the exclusive province of Article III courts, and have long done so without constitutional controversy. *See* 28 U.S.C. §636(c)(1); *Pacemaker Diagnostic Clinic of Am., Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 547 (9th Cir. 1984) (en banc) ("We hold that consensual reference of a civil case to a magistrate is constitutional[.]"). The constitutionality of a magistrate judge's authority under §636(c)(1) to enter final judgment with the parties' consent has been upheld by every court of appeals to address the issue. *See* American Bar Association, *Resolution 109*, at 5 & n.23 (Feb. 11, 2013) (collecting cases); *see also id.* at 10 (resolving that "bankruptcy judges may constitutionally enter final orders and judgments in *Stern*-type proceedings upon the consent of the parties"). There can thus be no argument that the magistrate system has a more robust consent requirement or differs in any way meaningful to the constitutional analysis.

Accordingly, were this Court to determine that the bankruptcy court may not constitutionally enter final judgment on matters of private right even with the parties' consent, that ruling would logically require the invalidation not only of §157(c)(2), but the magistrate system as well. Such a result would contradict this Court's assurance that its holding in *Stern* "does not change all that much," 131 S. Ct. at 2620, and would work nothing short of a revolution in the federal courts. It should be rejected.

2. Notably, the court of appeals did not hold that §157(c)(2) was unconstitutional. Pet. App. 43a-44a. Instead, the court expressly limited its holding to "*Stern* objection[s]," *id.* 42a, 44a—that is, objections to the bankruptcy court's entry of final judgment on a claim that Congress had mistakenly designated as "core" but that in fact could not constitutionally be determined by a non-Article III tribunal. The court held only that a litigant could not waive such an objection (or, presumably, consent to the bankruptcy court's adjudication of such a claim). *Id.* 44a.

The court expressly distinguished non-core claims that Congress did not mistakenly classify as core, strongly suggesting that §157(c)(2)'s provision for bankruptcy court adjudication of such claims with the parties' consent *is* constitutional:

> Section 157(c)(2) permits a bankruptcy judge to enter final judgment in a noncore proceeding, but only if the parties consent and the district court decides to refer the matter to the bankruptcy court. Thus, a strong argument can be made that with respect to noncore proceedings Congress has left the essential attributes of judicial power to Article III courts, and so the structural interests at issue with regard to [matters mistakenly designated as] core proceedings are not present under the current statutory scheme applicable to noncore proceedings, thereby allowing room for notions of waiver and consent.

Pet. App. 43a. In support, the court cited this Court's decisions in *Peretz* and *United States* v. *Raddatz*, 447 U.S. 667 (1980), finding no Article III barrier to the op-

eration of certain aspects of the magistrate system. *Id.* 43a-44a.

The court of appeals' distinction between "*Stern*" claims and other "non-core" claims permitted it to avoid the question whether §157(c)(2) and §636(c)(1) (permitting magistrates to enter final judgment with the parties' consent) are constitutional under its analysis. The distinction, however, makes no sense. As this Court made clear last Term in *Executive Benefits*, *Stern* claims are no different from any other non-core claims. The Court recognized that the "core" and "non-core" categories represented Congress's attempt to delineate the proceedings over which bankruptcy courts could constitutionally enter final judgment absent the parties' consent. *Executive Benefits*, 134 S. Ct. at 2171 & n.7. Applying severability principles, the Court held that *Stern* claims mistakenly categorized as "core" under §157(b) may "proceed as non-core within the meaning of §157(c)." *Id.* at 2173. Accordingly, the same provisions for consent and the same structural safeguards apply to *Stern* claims as to other non-core claims. For the reasons above, bankruptcy courts may enter final judgment with the parties' consent as to both kinds of claims. Regardless of the Court's answer to the question of consent, however, the two kinds of claims must rise and fall together—along with the analogous provisions in the magistrate system.

B. Under The Bankruptcy Rules, A Litigant's Consent Must Be Express

Although a litigant may consent to having a bankruptcy court adjudicate a matter of private right, the

Federal Rules of Bankruptcy Procedure require such consent to be express.[5]

Consent to having a non-Article III judge enter final judgment in a private-right dispute is no small thing. It is a relinquishment of the right to have an Article III judge preside over a critical—indeed, determinative—stage of the proceedings. As with respect to federal magistrates, consent is "[a] critical limitation" on the bankruptcy court's "expanded" authority. *Gomez*, 490 U.S. at 870.

Congress accordingly required that "the consent of all parties to the proceeding" be obtained before a bankruptcy court may enter final judgment in a non-core proceeding. 28 U.S.C. §157(c)(2). And the Bankruptcy Rules provide, in clear and unambiguous terms, that "[i]n non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order *except with the express consent of the parties.*" Fed. R. Bankr. P. 7012(b) (emphasis added); *see also id.* R. 7012 advisory committee's note (1987) ("A final order of judgment may not be entered in a non-core proceeding heard by a bankruptcy judge unless all parties *expressly* consent." (emphasis added)).

The rules further require parties to state in the complaint and responsive pleading whether the action is core or non-core and, if non-core, whether the party consents to entry of final orders or judgment by the bankruptcy judge.[6] And the rules make clear that

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[5] That is not to say that the *Constitution* requires that consent be express—a question this Court need not reach and which amicus does not address.

[6] *See* Fed. R. Bankr. P. 7008(a) (complaints filed in adversary proceedings "shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not con-

"[f]ailure to include the statement of consent does not constitute consent. Only *express consent* in the pleadings or otherwise is effective to authorize entry of a final order or judgment by the bankruptcy judge in a non-core proceeding." Fed. R. Bankr. P. 7008 advisory committee's note (1987) (emphasis added).

As this Court has observed, these rules are not mere suggestions—they are commands. *See Kontrick* v. *Ryan*, 540 U.S. 443 (2004) (Federal Rules of Bankruptcy Procedure are mandatory); *see also Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988) ("[I]n every pertinent respect, [a Federal Rule of Criminal Procedure is] as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions."). Accordingly, only express consent is sufficient to authorize entry of final judgment by the bankruptcy court in non-core matters—as courts have held both before and after *Stern*. *See, e.g.*, *In re Sheridan*, 362 F.3d 96, 100-101 (1st Cir. 2004); *In re Yochum*, 89 F.3d 661, 667 (9th Cir. 1996); *In re Brickell Inv. Corp.*, 922 F.2d 696, 701-702 (11th Cir. 1991); *Home Ins. Co.* v. *Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir. 1989).[7]

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sent to entry of final orders or judgment by the bankruptcy judge"); *id.* R. 7012(b) (responsive pleadings filed in adversary proceedings "shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge").

[7] *See also In re Lyondell Chem. Co.*, 467 B.R. 712, 722 (S.D.N.Y. 2012) (in light of Rule 7012(b), "mere implied consent appears to be insufficient"); *In re Madison Bentley Assocs.*, 474 B.R. 430, 436 (S.D.N.Y. 2012); *In re New York Skyline, Inc.*, 512

Nor does *Roell* v. *Withrow*, 538 U.S. 580 (2003), warrant a different result. *Roell* held—as a matter of statutory construction—that implied consent may satisfy §636(c)(1), a conclusion it reached only after determining that implied consent was consistent with "the text and structure of [§636] as a whole," and that an express consent rule would "'frustrate the plain objective of Congress to alleviate the increasing congestion of litigation in the district courts.'" *Id.* at 587, 590-591. The Court cautioned, however, that consent should be implied only in limited, exceptional circumstances. *Id.* at 591 n.7 ("[D]istrict courts remain bound by the procedural requirements of §636(c)(2) and Federal Rule of Civil Procedure 73(b)."). *Roell* did not address or interpret the bankruptcy rules, and it simply is not possible to read those rules to permit implied consent.

The facts of *Roell* are also instructive. The party raising the constitutional challenge (Withrow) *expressly* consented to adjudication by the magistrate and then waited until after he had lost at trial to argue that the magistrate lacked the authority to enter a final judgment because opposing counsel had not done the same. *Roell*, 538 U.S. at 582-583. The Court understandably determined that Article III's protections could not be wielded by a *consenting* party as a tactical maneuver. *Id.* at 590 ("Withrow ... received the protection intended by the statute[.]"). The Court had no opportunity to address a situation in which the complaining party has not expressly consented to adjudication by a non-Article III court.

B.R. 159, 177 (S.D.N.Y. 2014); *Kramer* v. *Mahia*, 2013 WL 1629254, at *4 (E.D.N.Y. Apr. 15, 2013); *Pryor* v. *Tromba*, 2014 WL 1355623, at *6 (E.D.N.Y. Apr. 7, 2014).

Adhering to the plain language of the bankruptcy rules ensures that the parties and the bankruptcy court are on notice of whether the bankruptcy court may enter final judgment from the outset of the proceeding. If a party fails to comply with the rules' requirement that it indicate in its initial pleading whether it consents to have the bankruptcy court "hear and determine" the matter, the other party may seek to enforce the rule in the bankruptcy court and demand an express statement one way or the other at the outset of the litigation. The rules thus operate to permit the diligent litigant to avoid being "sandbagged."

There are also other protections against a party's lying in wait on the issue of consent until after appeals have been taken and the merits decided, such as the ordinary principle of appellate waiver. As this Court has explained, "[n]o procedural principle is more familiar ... than that a constitutional right, or a right of any other sort, may be forfeited ... by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Stern*, 131 S. Ct. at 2608 (internal quotation marks omitted). Thus, even though a party's failure to object to entry of judgment does not constitute consent, on review of that judgment a party must timely raise—or forfeit according to the ordinary doctrine of appellate waiver—the argument that consent was not properly obtained.

In this case, Sharif stated in his summary judgment motion that Wellness's adversary proceeding was a core matter. Mem. in Supp. of Summ. J. 1, Dkt. 65-2 (Bankr. N.D. Ill. June 22, 2010). Amicus takes no position as to whether that statement constituted express consent sufficient to satisfy the Bankruptcy Rules. Nor does it take a position as to whether Sharif forfeited his objection to

the bankruptcy court's entry of final judgment by failing to raise that objection properly on appeal.

CONCLUSION

This Court should hold that the bankruptcy court could constitutionally enter final judgment on petitioner's claim even without respondent's consent and should therefore reverse the judgment of the court of appeals. If the Court disagrees, it should hold that bankruptcy courts may constitutionally enter final judgment in non-core proceedings with the parties' consent, but that under the Federal Rules of Bankruptcy Procedure such consent must be express.

Respectfully submitted.

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SEPTEMBER 2014

AMICUS CURIAE BRIEF

No. 13-935

IN THE

Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LTD., ET AL.
Petitioners,

v.

RICHARD SHARIF
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* G. ERIC BRUNSTAD, JR. IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The undersigned *amicus curiae* is an Adjunct Professor of Law at New York University School of Law and a frequent Visiting Lecturer in Law at the Yale Law School where he teaches various courses on bankruptcy, domestic and international business reorganizations, commercial transactions, secured transactions, federal courts, and argument and reason. He began teaching at Yale in 1990, began teaching at NYU in 2012, and has also taught at the Harvard Law School. In addition to his teaching, the undersigned is a contributing author for Collier on Bankruptcy, responsible for writing several chapters of the Treatise. He is also a partner at the law firm of Dechert LLP; a prior Chair of the ABA Business Bankruptcy Committee; a former member of the Judicial Conference Advisory Committee on the Federal Bankruptcy Rules;

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both petitioner and respondent have consented to the filing of this brief. Respondent has filed with the Court a letter consenting to the filing of *amicus curiae* briefs in support of either or neither party. A copy of petitioner's consent is filed herewith.

and a Fellow of the American College of Bankruptcy.

The undersigned has briefed and argued numerous bankruptcy matters before the Court, including *Schwab v. Reilly*, 560 U.S. 770 (2010); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008); *Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.*, 549 U.S. 443 (2007); *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). He has otherwise participated as counsel for one of the parties in numerous other bankruptcy matters before the Court, including *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014); *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Hamilton v. Lanning*, 560 U.S. 505 (2010); *Central Virginia Cmty. College v. Katz*, 546 U.S. 356 (2006); *Rousey v. Jacoway*, 544 U.S. 320 (2005); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Lamie v. United States Trustee*, 540 U.S. 526 (2004); *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293 (2003); and *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992). In addition, he has prepared and filed with the Court numerous amicus briefs in bankruptcy cases, including *Clark v. Rameker*, 134 S. Ct. 2242 (2014); *Law v. Siegel*,

134 S. Ct. 1188 (2014); *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 (2013); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012); *Hall v. United States*, 132 S. Ct. 1882 (2012); *Ransom v. FIA Card Servs.*, 562 U.S. 61 (2011); *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010); *Howard Delivery Serv., Inc. v. Zurich American Ins. Co.*, 547 U.S. 651 (2006); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *Archer v. Warner*, 538 U.S. 314 (2003); and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

The undersigned is deeply interested in the subject of bankruptcy law and has written, taught, and lectured on the subject of bankruptcy jurisdiction. The purpose of this brief is to address matters that bear on the Court's determination of two important bankruptcy issues: (1) whether a bankruptcy court has the constitutional authority to enter a final judgment in a declaratory judgment action brought under section 541 of the Bankruptcy Code, 11 U.S.C. § 541, to determine whether property in the debtor's possession is property of the bankruptcy estate notwithstanding the presence of state law issues; and (2) if generally not, whether Article III permits a bankruptcy court to enter a final order in such an action on the basis of litigant consent and, if so, whether such consent may be implied based on a litigant's conduct.

As to the first question presented, this Court has long recognized an exception to the requirement that the federal judicial power is to be exercised only by a judge who enjoys the constitutional protections of Article III in cases "involving public rights." *See, e.g.*, *Murray's Lessee v. Hoboken Land & Improvement Co.* 59 U.S. 272, 284, 18 How. 272 (1855). This brief explains that, unlike the state-law tortious interference counterclaim at issue in *Stern v. Marshall*, 131 S. Ct. at 2618, petitioner's declaratory judgment action under section 541 constitutes a public-right controversy notwithstanding the presence of state law issues because it involves a matter fundamental to the administration of the bankruptcy estate and stems from the bankruptcy itself. The constitutional concerns addressed in *Stern* are not present here, and the bankruptcy court properly exercised its authority in deciding petitioner's claim.

Because the bankruptcy court constitutionally decided petitioner's claim, the Court need not decide the second question presented. Nevertheless, if petitioner's claim constitutes a "*Stern* claim," the relevant problem under Article III may be cured by litigant consent, and respondent's consent properly may be implied from his litigation conduct. This Court has consistently allowed private rights to be adjudicated by consent before non-Article III judges. Most notably

in the analogous context of the magistrate judge system, it is well established that private rights may be decided where the parties consent and that such consent may be implied.

STATEMENT

In July 2008, the district court for the Northern District of Texas awarded petitioner, Wellness International Network, Ltd. ("WIN") $655,596.13 in attorneys' fees incurred in a civil suit brought against WIN by respondent, Richard Sharif. Pet. App. 6a. Following entry of the attorneys' fee award, Sharif filed for bankruptcy in the Northern District of Illinois under Chapter 7 of the Bankruptcy Code. *Id.*

The federal district courts possess jurisdiction over all bankruptcy cases and proceedings. 28 U.S.C. § 1334. Pursuant to section 157(a) of Title 28, the district courts may delegate that authority to the bankruptcy judges in their districts. *Id.* § 157(a). Section 157(b)(1) in turn authorizes a bankruptcy judge to "hear and determine" all "cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11," and, with the parties consent, to hear and determine all non-core proceedings related to a bankruptcy case. *Id.* §§ 157(b)(1), (c)(2). Absent the parties' consent, a bankruptcy judge may "hear" a non-core proceeding, but only issue proposed findings of fact and

conclusions of law in such matters, subject to *de novo* review in the district court. *Id.* § 157(c)(1). Following Sharif's filing of his bankruptcy case, the bankruptcy court obtained jurisdiction over his case under this scheme.

By operation of law, when Sharif's commenced his case, a bankruptcy estate was created consisting of all of his property "wherever located and by whomever held." 11 U.S.C. § 541. The office of the United States Trustee–a division of the Department of Justice with oversight authority in bankruptcy cases–then appointed a trustee to administer Sharif's estate, take possession of the property in his estate, and facilitate the liquidation of the assets in the estate for the benefit of his creditors. *Id.* § 701(a)(1) (providing for the appointment of a trustee in every chapter 7 case); § 704(a)(1) (providing that the duties of a chapter 7 trustee include "collect[ing] and reduc[ing] to money the property of the estate"); § 726 (providing distribution procedures in a chapter 7 proceeding).

In order to facilitate the administration of his bankruptcy case, Sharif was required to file a truthful schedule of his assets and liabilities using the appropriate official forms–in this case Official Form 6. *Id.* § 521(a)(1); Fed. R. Bankr. P. 1007 (a)(1); Fed. R. Bankr. P. 1007 (b)(1)(a), Form 6. Form 6 includes a Schedule A that a debtor must use to list all real property, a Sche-

dule B to list all personal property, and a Schedule C to list all property claimed as exempt. A debtor must also list all creditors, whether secured or unsecured, on Schedules D, E and F. Form 6 also includes a Declaration Concerning Debtor's Schedules that a debtor must sign, declaring under penalty of perjury that the Schedules are true and correct to the best of the debtor's knowledge and belief. The meeting of the creditors, required by section 341, provides the trustee an opportunity to question the debtor regarding the debtor's schedules and assets. *See* 11 U.S.C. § 341; Fed R. Bankr. P. 2002(a)(1), 2003(b)(1).

Sharif's bankruptcy petition listed WIN as a creditor, and WIN filed a proof of claim in Sharif's bankruptcy. Pet. App. 6a-7a. During the proceedings in Texas, WIN had obtained a copy of a 2002 loan application that Sharif had submitted to Washington Mutual, in which he represented that he owned over $5 million in assets. Pet. App. 7a. At the section 341 creditors' meeting, both WIN and the Chapter 7 trustee requested documents relating to these assets, which were not included in the Schedules filed with Sharif's bankruptcy petition. *Id.* Sharif failed to produce the requested documents and later informed WIN that he had lied on the loan application and that the assets in fact belonged to the Soad Watter Trust—a trust of which Sha-

rif was the trustee—and not to Sharif individually. *Id.*

WIN initiated a five-count adversary proceeding in Sharif's bankruptcy. Counts I-IV sought to prevent the discharge of Sharif's debts pursuant to 11 U.S.C. § 727, and Count V sought a declaratory judgment that the assets in the Soad Watter Trust were part of Sharif's bankruptcy estate. Pet. App. 8a. Sharif repeatedly failed to respond to WIN's discovery requests. Pet. App. 9a. On April 15, 2010, WIN filed a motion for sanctions and, in the alternative, to compel discovery. *Id.* The bankruptcy court granted the motion to compel, ordering Sharif to comply with all outstanding discovery requests, and continued the motion for sanctions pending Sharif's compliance with the discovery order. *Id.* Sharif again failed adequately to respond to the discovery requests. Pet. App. 9a-10a. On July 6, 2010, the bankruptcy court found that Sharif had failed to produce documents and disclose information related to his assets, and entered a default judgment in favor of WIN on all five counts of the adversary complaint. Pet. App. 10a-14a.

Sharif appealed the bankruptcy court's judgment to the district court. After Sharif filed his opening appellate brief, he filed a motion for supplemental briefing regarding this Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). Pet. App. 15a. The district court denied

Sharif's motion for supplemental briefing and affirmed the bankruptcy court's judgment. Pet. App. 16a. Because *Stern* was decided more than a month prior to the time Sharif filed his opening brief, the district court determined that Sharif had waived any argument based on *Stern* by not raising it in his briefing. *Id.*

Sharif appealed the district court's decision to the Seventh Circuit. Pet. App. 17a. On August 21, 2013, the Seventh Circuit affirmed the denial of Sharif's discharge, holding that Counts I-IV of WIN's adversary complaint "stem from federal law, not state law, as the provisions of 11 U.S.C. § 727 provide the relevant rules of decision," and that "whether to grant or deny discharge is central to the restructuring of the debtor-creditor relationship." Pet. App. 45a-46a.

In contrast to its disposition of Counts I-IV, the Seventh Circuit held that the bankruptcy court lacked constitutional authority to decide WIN's declaratory judgment claim in Count V. Pet. App. 46a-51a. The court held that a determination as to whether the assets that Sharif alleged belonged to the Soad Wattar Trust were in fact property of the bankruptcy estate was a "state law claim between private parties that is wholly independent of federal bankruptcy law and is not resolved in the claims-allowance process," Pet. App. 51a, and that, therefore, WIN's claim "is indistinguishable from the tor-

tious interference claim in *Stern*," Pet. App. 48a. The Seventh Circuit further held that Sharif's constitutional objection to the bankruptcy court's authority implicated the structural protections of Article III, and therefore could not be waived. Pet. App. 41a-42a.

SUMMARY OF THE ARGUMENT

In *Stern v. Marshall*, this Court determined that, under Article III, a federal bankruptcy court may not finally decide a state-law counterclaim asserted by a bankrupt debtor against a creditor who filed a claim against the debtor, at least where the creditor did not consent to the final adjudication of the counterclaim and the resolution of the counterclaim was not necessarily integral to the bankruptcy administrative process. As the Court emphasized in *Stern*, and reiterated in *Executive Benefits Insurance Agency v. Arkison*, the question decided in *Stern* was a narrow one, and the Court's resolution of it did not "meaningfully change[] the division of labor" in the administration of bankruptcy cases. *Stern*, 131 S.Ct. at 2620; *Arkison*, 134 S.Ct. 2165, 2173 n.8 (2014). In contrast, the decision below in this case dramatically alters the administrative landscape. First, it improperly extends *Stern* to matters that more fundamentally stem from the bankruptcy itself, and thus strikes at the heart of Congress's administrative scheme. Second, it improperly denies the ability of the li-

tigants to consent to participate fully in that scheme. The decision below should be reversed.

ARGUMENT

I. The Bankruptcy Court Properly Entered Judgment On Petitioners' Declaratory Judgment Claim.

In *Stern*, the Court established that Article III precludes Congress from assigning to non-Article III bankruptcy judges the final adjudication of certain private-right controversies enumerated as "core" bankruptcy proceedings in section 157 of Title 28. 131 S. Ct. 2594, 2608 (2011). Because the tort claim at issue in *Stern* was fundamentally a state law claim and did not implicate a public right, it was only amenable to final determination and entry of judgment in federal court by an Article III judge, at least absent the parties' consent otherwise. *Id.* at 2611. Unlike the counterclaim at issue in *Stern*, WIN's declaratory judgment claim seeking to establish that certain assets in Sharif's possession are in fact part of Sharif's bankruptcy estate more properly implicates a basic aspect of bankruptcy administration and is a matter of public right. Because the claim in fact stems from the bankruptcy, the constitutional concerns raised by *Stern* are not present here.

A. This Court Has Established A Public-Rights Exception To Article III.

Under Article III, "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. ART. III, § 1. The judges of those courts "shall hold their Offices during good Behaviour" and "receive for their Services[] a Compensation[] [that] shall not be diminished" during their tenure. *Id.* As the Court has explained, Article III protects the liberty of individuals "not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges." *Stern*, 131 S. Ct. at 2609. But as the Court's decisions also illustrate, the requirements of Article III are not inflexibly monolithic.

In *Murray's Lessee v. Hoboken Land & Improvement Co.*, the Court first acknowledged the existence of a class of cases "involving public rights" that "[C]ongress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." 59 U.S. 272, 18 How. 272, 284 (1855). Although the Court did not define precisely the boundaries of this public rights doctrine, it emphasized that Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiral-

ty." *Id.* As the Court recognized, the Constitution requires that such matters of private right be decided by Article III judges if litigated in federal court.

Since *Murray's Lessee*, the Court has revisited and redefined the boundaries of the concept of a "public right." Some cases have stated that "a matter of public rights must at a minimum arise 'between the government and others.'" *E.g. Northern Pipeline Constr. Co. v. Marathon*, 458 U.S. 50, 69 (1982) (plurality). More recently, the Court rejected the conclusion "that the right to an Article III forum is absolute unless the Federal Government is a party of record." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 586 (1985). Following *Union Carbide*, the Court has explained that "[t]he crucial question, in cases not involving the Federal Government, is whether Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, has created a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989) (brackets and internal quotation marks omitted). Following *Granfinanciera*, the Court explained in *Stern* that "it is still the case that what makes a right 'public' rather than private is that the right

is integrally related to particular federal government action." 131 S. Ct. at 2613. In contrast, "[w]hen a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789, and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." *Id.* at 2609 (*quoting Northern Pipeline*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment)).

B. The Counterclaim At Issue In *Stern* Did Not Involve A Matter Of Public Right.

Stern concerned the disposition of the estate of J. Howard Marshall, II ("J. Howard") following his marriage to Vickie Lynn Marshall ("Vickie") and his subsequent death. *Id.* at 2601. After his death, Vickie filed for bankruptcy, and Pierce Marshall ("Pierce") filed a proof of claim in her bankruptcy case and sought a declaration that a defamation claim he had against her was non-dischargeable. *Id.* Vickie then filed a counterclaim against Pierce, alleging a state-law claim of tortious interference with her expectancy of a gift from J. Howard. *Id.* On September 27, 2000, the bankruptcy court entered judgment against Pierce on Vickie's tortious interference counterclaim for over $474 million. *See Marshall v. Stern (In re Marshall)*, 600 F.3d 1037, 1045 (9th Cir. 2010). The bankruptcy court relied on

section 157(b)(2)(C) to hold that Vickie's counterclaim was a "core proceeding" that could be finally decided by the bankruptcy court because it was a "counterclaim[] by the estate against [a] person[] filing [a] claim[] against the estate." *Stern*, 131 S. Ct. at 2602; 28 U.S.C. § 157(b)(2)(C).

After a long and complicated litigation history, this Court held that the bankruptcy court lacked constitutional authority to decide Vickie's state law counterclaim, despite that claim being statutorily designated a "core" claim. *Stern*, 131 S. Ct. at 2608, 2611. The Court rejected the idea that Vickie's claim was a matter of "public right," finding that the claim was brought "under state common law between two parties. . . . [and] does not 'depend on the will of congress.'" *Id.* at 2614 (*quoting Murray's Lessee*, 18 How. at 284). Critically, the Court stated that "there was never any reason to believe that the process of adjudicating Pierce's proof of claim would necessarily involve Vickie's counterclaim," *id.* at 2617, and found Vickie's claim to be "in no way derived from or dependent upon bankruptcy law; it is a state tort action that exists without regard to any bankruptcy proceeding," *id.* at 2618. As the Court explained, "Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the question is whether the action at issue stems from the bank-

ruptcy itself or would necessarily be resolved in the claims allowance process." *Id.*

C. WIN's Declaratory Judgment Claim Involves a Public-Right Controversy.

The Seventh Circuit erred in concluding that WIN's declaratory judgment claim was "indistinguishable from the tortious interference counterclaim in *Stern*." Pet. App. 48a. In fact, the claims are entirely distinguishable, and Win's claim does not involve a private-right controversy.

As the Court's decisions illustrate, whether or not a particular claim involves a matter of public or private right turns on analysis of the particular claim at issue in the context in which it is being administered. In other words, the analysis properly proceeds on a claim-by-claim basis alongside consideration of whether the adjudication of the particular claim is fundamentally independent of, or inextricably intertwined with, a particular regulatory regime. In *Stern*, the Court determined that the resolution of Vickie's state-law counterclaim was essentially independent of the administration of her case. *Stern*, 131 S. Ct. at 2617-18. So, too, in *Northern Pipeline*, the resolution of the relevant state-law breach of contract action was also independent. 458 U.S. at 2881 (Rehnquist, J., concurring in the judgment). The fact that the debtor's suc-

cessful prosecution of the claim (contract or tort) might augment the bankruptcy estate was, by itself, insufficient to render the claim a public-right controversy—if it could, there would be little left to the private-right concept in bankruptcy because the resolution of virtually every claim will have some impact on the estate or the debtor, such as by augmenting the estate. *See Stern*, 131 S. Ct. at 2618. In contrast, WIN's declaratory judgment action to determine whether property in Sharif's possession constitutes property of his estate is fundamentally different because the resolution of WIN's claim is far more administrative in nature and inextricably intertwined with the traditional bankruptcy administrative process.

Contrary to the Seventh Circuit's opinion, WIN's declaratory judgment claim is not fundamentally one that "stems from state law rather than a federal regulatory scheme." Pet. App. at 48a. As petitioners ably explain in their brief, the determination of whether property in the actual or constructive possession of the debtor is properly included in the bankruptcy estate is traditionally a basic aspect of bankruptcy administration and is a matter of public right. Pet. Br. at 20-25; *see, e.g., Central Virginia Cmty. College v. Katz*, 546 U.S. 356, 363-64 (2006) (noting that "[o]ne of the critical features of every bankrupt-

cy," is the bankruptcy court's control over "all of the debtor's property").

Congress established a procedure by which Sharif was required to disclose his assets, under penalty of perjury, to facilitate the trustee's administration of his estate. *See, e.g.*, 11 U.S.C. § 521; Fed. R. Bankr. P. 1007. Sharif was untruthful in listing his assets, and effectively resisted the lawful administration of his estate. Under the circumstances, the bankruptcy court's determination of whether the assets Sharif alleged belonged to the Shoad Wattar Trust were in fact property of the estate is fundamentally and inextricably intertwined with the bankruptcy administrative process. That a question of state law is implicated does not transform the claim to a private-right matter where, as here, the declaratory claim is essentially and inextricably administrative in nature. *See, e.g.*, 28 U.S.C. 157(b)(3) ("A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.").

II. Consensual Resolution of Private-Rights Controversies by Adjudicators Working Under and at the Pleasure of Article III Judges Is Constitutional.

Because WIN's declaratory judgment claim does not implicate the constitutional concerns

present in *Stern*, the Court need not reach the question whether Sharif could consent to the bankruptcy court's entry of a final decision on the claim and, if so, whether his consent could be implied. Should the Court consider these issues, however, both should be answered in the affirmative.

As the Court has explained, "Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States . . . serves to protect *primarily* personal, rather than structural, interests." *Commodity Futures Trading Commision v. Schor*, 478 U.S. 833, 848 (1986) (emphasis added). This is so because private rights, as their name implies, are entitlements held by private individuals, whose dignity and autonomy in choosing how they wish to resolve their disputes should be respected. For this reason, the presence or absence of consent has been the touchstone of this Court's jurisprudence on the constraints of Article III.

A. The Court Has Long Approved the Historical Practice of Consensual Private-Rights Dispute Resolution by Adjudicators Working Within Article III.

Under the earliest American bankruptcy statutes, judicial officers lacking the protections of Article III have played an important role in ad-

judicating claims that, without the parties' consent, would traditionally be decided in federal court by Article III judges. For example, following ancient chancery court practice, federal courts sitting in equity routinely permitted special masters to resolve a variety of disputes over matters of private right. *E.g.*, *Kimberly v. Arms*, 129 U.S. 512, 524 (1889).

Sometimes the master would serve only a recommending role, with final judgment reserved to an Article III judge, but at other times, the master was given full adjudicatory authority. As the Court explained in *Kimberly*, the touchstone of this power derived from the autonomy of the parties:

> It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him, without the consent of the parties. It cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented and devolve that duty upon any of its officers. But when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law, and such reference is entered as a rule of the court, the

> master is clothed with very different powers from those which he exercises upon ordinary references, without such consent; and his determinations are not subject to be set aside and disregarded at the mere discretion of the court. A reference, by consent of the parties, of an entire case for the determination of all its issues, though not strictly a submission . . . to arbitration . . . , is a submission of the controversy to a tribunal of the parties' own selection.

Id. at 524 (citing English authorities and finding the power to refer such cases upon party request "incident to all courts of superior jurisdiction").

Similarly, in *Heckers v. Fowler*, 69 U.S. (2 Wall.) 123 (1864), the Court upheld the parties' joint consent to a referee. The parties "agreed that the report of the referee should have the same force and effect as a judgment of the court . . . ." *Heckers*, 69 U.S. at 133. The circuit court ordered, "by consent of parties, that on filing the [referee's] report with the clerk of the court, judgment should be entered in conformity therewith, the same as if the cause had been tried before the court." *Id.* The referee made and filed the report, and the clerk entered judgment. *Id.* This Court affirmed. *Id.* at 133–34. In fact, bankruptcy commissioners and referees historically issued their decrees directly in resolving their cases. *See, e.g.*, John C. McCoid, *Right to*

Jury Trial in Bankruptcy: Granfinanciera, S.A. v. Nordberg, 65 AM. BANKR. L.J. 15, 30 n.80 (1991) (English bankruptcy commissioners) (citing *Clark v. Capron*, 30 Eng. Rep. 832 (1795)); *Mitchell v. Mitchell*, 59 F.2d 62, 66 (1st Cir. 1932), ("The decree of the District Court is reversed, and the order or decree of the referee is affirmed . . . ").

Critically, these practices did not "create" jurisdiction "by consent" where it did not otherwise exist. In all instances, as is the case here, the referring courts possessed subject matter jurisdiction over the relevant controversy and likewise possessed the necessary reference authority (either as a matter of tradition, statute, or rule). These practices demonstrate that, with the consent of the parties, courts *with* statutory jurisdiction could legitimately exercise their reference authority to refer matters to be heard and finally determined by non-Article III adjudicators.

B. Modern Precedents Continue the Court's Approval of Consensual Adjudication Regimes in the Context of Magistrate Judges.

Modern cases continue this tradition of approving consensual resolution of private-rights disputes within Article III-controlled regimes. In 2003, the Court decided *Roell v. Withrow*, which involved implied consent to final judgments by

federal magistrate judges under 28 U.S.C. § 636(c)(1). 538 U.S. 580, 585–86 (2003). Section 636(c)(1)'s grant of authority to magistrate judges is even broader than section 157(c)(2)'s grant of authority to bankruptcy judges to enter judgment in non-core proceedings "related to" bankruptcy upon party consent: section 636(c)(1) allows consensual magistrate final judgments in all civil proceedings and even misdemeanor criminal trials. *Compare* 28 U.S.C. § 636(c)(1) *with* 28 U.S.C. § 157(c)(1). Rejecting the argument that express consent was a precondition to such consensual adjudicative power, the Court affirmed that implied consent of the parties sufficed. *Roell*, 538 U.S. at 582, 586–87 (holding that the statute's textual reference to mere "consent" trumped Federal Rule of Civil Procedure 73(b)'s reference to an express execution and filing of "a joint form of consent").

Although the dissent disapproved of implied consent, preferring for prudential reasons the bright-line rule of express consent to escape what it feared would be a litigation-inducing standard, *id.* at 596 (Thomas, J., dissenting), the dissent still recognized the Article III permissibility of party consent to magistrate court disposition by final judgment: "Reading § 636(c)(1) to require express consent . . . *ensures that the parties knowingly and voluntarily waive their right*

to an Article III judge." *Id.* at 595 (emphasis added).

Although *Roell* was decided on statutory grounds, Article III concerns were keenly present, as the preceding quotation makes clear, and the Court's repeated citations to *Schor* confirm. *Roell*, 538 U.S. at 588–90; *id.* at 595 (Thomas, J., dissenting). Indeed, *Roell*'s holding would make little sense if Article III structurally prohibited litigant consent to magistrate judge adjudications and would not accord with the Court's practice of allowing complaints of such errors to be forfeited. *Plaut v. Spendthrift Farm., Inc.*, 514 U.S. 211, 231 (1995) ("[T]he proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with our cases.").

The more plausible characterization of *Roell* is that there was no need to address any Article III concerns because the Court had already settled the matter in a previous case. In upholding consensual magistrate judge authority to conduct felony *voir dire*, the Court in *Peretz v. United States* unambiguously held: "There is no Article III problem when a district court judge permits a magistrate to conduct *voir dire* in accordance with the defendant's consent." 501 U.S. 923, 932 (1991). The Court explained that "with the parties' consent, a district judge may dele-

gate to a magistrate supervision of entire civil and misdemeanor trials. These duties are comparable in responsibility and importance to presiding over *voir dire* at a felony trial." *Id.* at 933.

Moreover, the Court's implicit recognition of the constitutional propriety of consensual magistrate judge adjudication is unsurprising given that every court of appeals has come to the same result when called upon to address the constitutional issue explicitly.[2] In fact, that the consensual bankruptcy court regime mirrors this magi-

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[2] *See Sinclair v. Wainwright*, 814 F.2d 1516, 1519 (11th Cir. 1987); *Bell & Beckwith v. United States*, 766 F.2d 910, 912 (6th Cir. 1985); *Gairola v. Virginia Dep't of Gen. Servs.*, 753 F.2d 1281, 1285 (4th Cir. 1985); *D.L. Auld Co. v. Groma Graphics Co.*, 753 F.2d 1029, 1032 (Fed. Cir. 1985); *United States v. Dobey*, 751 F.2d 1140, 1143 (10th Cir. 1985); *Fields v. Washington Metro. Area Transit Auth.*, 743 F.2d 890, 893 (D.C. Cir. 1984); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1045 (7th Cir. 1984); *Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Refining Corp.*, 739 F.2d 1313, 1316 (8th Cir. 1984); *Puryear v. Ede's Ltd.*, 731 F.2d 1153, 1154 (5th Cir. 1984); *Goldstein v. Kelleher*, 728 F.2d 32, 36 (1st Cir. 1984); *Collins v. Foreman*, 729 F.2d 108, 115–16 (2d Cir. 1984); *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 540 (9th Cir. 1984) (en banc) (Kennedy, J.); *Wharton-Thomas v. United States*, 721 F.2d 922, 929–30 (3rd Cir. 1983).

strate system led Chief Judge Easterbrook to question the decision below. In *Peterson v. Somers Dublin Ltd.*, 729 F. 3d 741, 746-47 (7th Cir. 2013), Judge Easterbrook pointed out that the Seventh Circuit panel in this case neglected to address the court's prior decision upholding the magistrates' similar authority against Article III challenge.

In sum, the magistrate judge cases confirm the Court's ongoing approval, recognized by the lower courts, of consensual magistrate judge adjudication of private rights.

C. *Stern* Itself Cements This Court's Approval of the Historical Practice of Consensual Adjudicatory Regimes.

Most recently, and in alignment with the longstanding Court tradition of approving consensual adjudicatory regimes within Article III, the Court in *Stern* cited the bankruptcy judge consensual adjudication provision without objection:

> Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. *See* §§ 157(b)(1), (c)(1). That allocation does not implicate questions of subject matter jurisdiction. *See* § 157(c)(2) (*parties may*

> *consent to entry of final judgment by bankruptcy judge in non-core case*).

131 S. Ct. at 2607 (emphasis added). As the Court further explained, the unobjectionable nature of consensual private-rights resolution by bankruptcy courts was equally accepted by *Stern*'s dissenters:

> The dissent reads our cases differently, and in particular contends that more recent cases view *Northern Pipeline* as establishing only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review. Just so: Substitute "tort" for "contract," and that statement directly covers this case.

Id. at 2615 (emphasis added) (citations, internal quotation marks, and alterations omitted).

The historical precedents, modern magistrate cases, and even *Stern* itself confirm the Court's trajectory: consensual private-rights adjudicatory regimes that arise wholly within Article III and allow the judiciary and the parties the joint discretion to use or ignore them at their pleasure fully comport with the Constitution.

D. The Fatal Flaw in Unconstitutional Private-Rights Adjudicatory Regimes Has Always Been the Absence of Consent.

In *Stern* and other precedents, the Court has consistently identified the lack of party consent as a critical defect in non-Article III regimes. For example, in *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568 (1985), the Court stated that its decision in *Northern Pipeline* "establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review." *Id.* at 584 (emphasis added); *accord Stern*, 131 S. Ct. at 2614–15. And *Stern*'s consent ruling synthesized prior precedent that could have been read to create an overly broad understanding of consent merely by filing a claim in bankruptcy.

Deemed consent to summary adjudication of otherwise plenary claims simply by virtue of filing a proof of claim was colloquially known as "jurisdiction by ambush" under the 1898 Act. *See, e.g.*, *In re Bokum Res. Corp.*, 49 B.R. 854, 863 (Bankr. D.N.M. 1985) ("This . . . result[s] in a return to the much-maligned jurisdiction by ambush which prevailed prior to 1978."). *Stern* ended this practice. In *Stern*, Vickie argued that

Pierce consented to counterclaim adjudication simply by filing his claim, citing *Langenkamp v. Culp*, 498 U.S. 42 (1990) and *Katchen v. Landy*, 382 U.S. 323 (1966) for the proposition that mere filing of a claim constitutes meaningful consent. *Stern*, 131 S. Ct. at 2616. *Stern*'s rejection of Vickie's position turned on the true meaning of consent. The Court found implicit consent unwarranted, because all Pierce could truly be said to have consented to was adjudication of his claim and those counterclaims that would necessarily be resolved in processing his consented claim. *Id.* at 2614. The Court solved the *Langenkamp* tension by clarifying that a consensually filed claim only supports implied consent to necessarily intertwined counterclaims. *Id.* at 2617 (citing *Langenkamp*, 498 U.S. at 44–45). In sum, only true consent, which the Court found absent in *Stern*, will suffice.

Indeed, consent is so critical in the Article III analysis that the differing outcomes in *Gomez v. United States*, 490 U.S. 858 (1989), and *Peretz* turned on its presence and absence in otherwise identical circumstances. In *Gomez*, the Court invoked the canon of constitutional avoidance in interpreting the Magistrates Act to forbid magistrate judges from conducting *voir dire* in felony cases without the parties' consent. *Gomez*, 490 U.S. at 864. But consent "significantly change[d] the constitutional analysis" in *Peretz* and led the

Court to conclude that "[t]here is no constitutional infirmity in the delegation of felony jury trial selection to a magistrate when the litigants consent." *Peretz*, 501 U.S. at 932, 936.

Unsurprisingly, every relevant case in which the Court has found constitutional transgression under Article III has involved an objecting defendant forced to litigate its private rights involuntarily before a non-Article III judge. *See Northern Pipeline*, 458 U.S. at 56 (plurality opinion); *id.* at 90 (Rehnquist, J., concurring in the judgment); *Stern*, 131 S. Ct. at 2614; *Granfinanciera*, 492 U.S. at 37. In contrast, consensual regimes have been upheld. *Schor*, 478 U.S. at 849; *Langenkamp*, 498 U.S. 42. And even some involuntary regimes have been upheld, either under the permissibility of the non-Article III adjudication of public rights, *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 283–84 (1855), an administrative agency adjunct test, *Crowell v. Benson*, 285 U.S. 22, 56–61 (1932), or a combination of both, *Union Carbide*, 473 U.S. 568, 593–94 (mandatory arbitration regime). The authority of a district court to refer private-rights controversies to be finally adjudicated by a bankruptcy judge with the parties' consent is thus fully consistent with this Court's precedents.

E. *Schor's* Reference to Unwaivable "Structural" Article III Rights Is Inapposite to this Case.

The Seventh Circuit's decision below misreads this Court's discussion in *Schor* concerning the structural, unwaiveable aspects of Article III and misunderstands the separation of powers doctrine in concluding that, under *Stern*, granting authority over "core" claims to bankruptcy courts implicates structural concerns. *See* Pet. App. 35a-41a. Unwaiveable, "structural" Article III concerns do not arise in this case.

1. Schor's "Structural Test" for Separation of Powers Concerns Applies Only to Inter-Branch Encroachment.

Because the adjudication of private rights within the federal system is typically and principally a matter between the parties whose rights are being adjudicated, the Court in *Schor* recognized that Article III's protections are "primarily" personal, and hence waivable: "[Our Article III jurisprudence indicates] that this guarantee serves to protect primarily personal, rather than structural interests. . . . Article III, § 1[] was designed as a protection for the parties from the risk of legislative or executive pressure on judicial decision." *Schor*, 478 U.S. at 848 (citations omitted). Additionally, however, the Court qualified that in some—but not all—cases, Article III

concerns can rise to structural levels beyond the parties' ability to waive:

> Article III, § 1 . . . [bars] congressional attempts to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts, and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other. *To the extent this structural principle is implicated in a given case*, the parties cannot by consent cure the constitutional difficulty . . . .

Id. at 850-51 (emphasis added) (citations and internal quotation marks omitted).

This case is not one in which the structural concern is implicated. Congress has not undertaken to "emasculate" constitutional courts—far from it. Bankruptcy judges perform their functions entirely within the confines of the judicial branch; they hear bankruptcy cases at the pleasure of Article III judges, who supervise and review their work. By contrast, the subset of cases implicating structural separation of powers concerns comprises those involving the "encroachment or aggrandizement of one branch at the expense of the other[s]." *Id.* at 850. This interpretation tracks *Schor*'s analysis, in which every source cited references encroachment or aggrandizement between the branches. Indeed, even

oft-quoted Federalist 78, explains in full context that its concern over periodical appointments stems from inter-branch encroachment:

> If the power of making [periodical appointments] was committed either to the Executive or the Legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the People, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

The Federalist No. 78, at 546 (Alexander Hamilton) (H. Dawson ed. 1876).

Neither modern Court precedents nor historical sources indicate that any Article III encroachment concern would arise when Article III judges may at their election refer matters to consensual adjudication before a bankruptcy judge. On the contrary, the concern is with inter-branch interference with the judicial power. As the Court explained in *Peretz*:

> Even assuming that a litigant may not waive structural protections provided by

> Article III, see *Schor*, we are convinced that no such structural protections are implicated by the [consensual magistrate] procedure followed in this case. Magistrates are appointed and subject to removal by Article III judges. *The 'ultimate decision' whether to invoke the magistrates' assistance is made by the district court, subject to veto by the parties.* . . . [T]here is no danger that use of the magistrate involves a 'congressional attempt to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts.

Peretz, 501 U.S. at 937 (emphasis added) (citations omitted); *see also Gonzalez v. United States*, 553 U.S. 242, 254 (2008) (Scalia, J., concurring in the judgment) (agreeing that Constitution creates no obstacle to waiver of right to Article III judge). Wholly intra-Article III regimes thus do not even implicate *Schor*'s encroachment concerns.

2. *The Consensual Bankruptcy Court Adjudication Regime Within Article III Evinces No Impermissible Delegation of Judicial Authority.*

The fact that consensual schemes, like the bankruptcy and magistrate judge ones, do not exhibit inter-branch encroachment does not nec-

essarily end all structural inquiry. *See Peretz*, 501 U.S. at 956 (Scalia, J., dissenting) ("[T]he Constitution guarantees . . . that none of the branches will *itself* alienate its assigned powers. Otherwise, the doctrine of unconstitutional delegation . . . is a dead letter."); *Gonzalez*, 553 U.S. at 265–66 (Thomas, J., dissenting) (same); *Pacemaker*, 725 F.2d at 544 (Kennedy, J.) (disaggregating from encroachment concern the additional problem of "the erosion of the central powers of the judiciary by permitting it to delegate its own authority").

In this regard, the nondelegation doctrine, if applied to the judiciary, might prohibit the complete abdication or self-inflicted diminishment of the judiciary's core constitutional role. *Cf. A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) ("The Congress is not permitted to abdicate or to transfer to others the essential legislative function[] . . . ."). But the nondelegation doctrine has never required the complete stagnation and insularity of all decision-making functions.

Applying this doctrine to the judicial power would involve considering whether the judiciary retained sufficient control and accountability over the delegated actors. There can be no question that Article III judges maintain robust involvement in bankruptcy, with appellate review

of all questions of law and fact, and the overarching power to deny or cancel the reference.

More importantly, it is doubtful whether vindication of party consent to bankruptcy court adjudication even invokes the concerns animating the nondelegation doctrine. Permitting final adjudication in bankruptcy court upon request of the parties is not judicial shirking of difficult questions; it is respecting the autonomy of the parties and is no more a constitutional abdication than confirming an arbitration award, dismissing a case upon a consensual settlement agreement, or even allowing a clerk to enter a default judgment. *See Schor*, 478 U.S. at 855; Fed R. Civ. P. 55(b)(1).

Viewed in this light, consensual adjudication regimes within Article III do not impermissibly delegate the judicial power. As then-Judge Kennedy recognized, "[f]rom a realistic and practical perspective, reference of civil cases to magistrates with the consent of the parties, subject to careful supervision by Article III judges, may serve to strengthen an independent judiciary, not undermine it." *Pacemaker*, 725 F.2d at 546.

3. *The Existence of Consensual Adjudication Regimes Within Article III Otherwise Satisfies* Schor.

Even if the Court were to apply *Schor*'s balancing test to structural concerns arising wholly within the judicial branch, consensual bankruptcy adjudication would pass muster. To begin with, a key consideration weighing heavily in favor of its legitimacy is its consensual nature. *See Schor*, 478 U.S. at 855. In addition to consent, *Schor* counsels examining the degree to which the non-Article III forum exercises Article III judicial power, the origin and importance of the right to be adjudicated, the concerns that drove Congress to depart from Article III, and the "degree of judicial control saved to the federal courts." *Id.* at 852–55. While bankruptcy and magistrate judges exercise more judicial power than the particularly administrative agency at issue in *Schor*, the centuries-old practice of bankruptcy adjudication driven by the need for an "inexpensive and expeditious alternative to existing fora," *id.* at 836, justifies the consensual adjudication of bankruptcy-related private rights under *Schor's* pragmatic test. Finally, on the critical factor of ongoing control and supervision by Article III judges, the bankruptcy judges remain clearly subordinate and subject to the control and supervision of Article III courts, which

have the power to decline references *ex ante* and withdraw them *ex post*.

F. The Seventh Circuit's Broad Decision Undermines the Court's Careful Insistence That *Stern*'s Holding Was Narrow.

The Seventh Circuit's opinion construes *Stern*'s scope as so broad-sweeping that it now precludes bankruptcy judges from deciding disputes related to whether property is part of the bankruptcy estate if that dispute involves any state property law issue. In addition to upending centuries of bankruptcy practice and threatening to invalidate the magistrate judge system, the opinion below rests upon a flawed assumption that *Stern* was intended to destabilize the very foundation of the bankruptcy process. *See Union Carbide*, 473 U.S. at 599 (Brennan, J., concurring in the judgment) ("Properly understood, the [public rights analysis of the *Northern Pipeline* plurality] does not place the Federal Government in an Art. III straitjacket whenever a dispute technically is one between private parties. We recognized that a bankruptcy adjudication, though technically a dispute among private parties, may well be properly characterized as a matter of public rights.").

Since the nineteenth century, the bankruptcy system has divided matters into proceedings that

bankruptcy judges may finally adjudicate and those that they may not (absent the consent of the parties). While the relevant line between these types of proceedings has been labeled in different ways, one constant persists: certain matters are central—"core"—to the bankruptcy power, such as the expeditious resolution of claims against the bankruptcy *res*. Adjudication of those matters by bankruptcy judges or their precursors, with or without party consent, has never been held to violate Article III.

It is true that the Court has never officially sanctioned the bifurcated system and concomitant vesting of full adjudicative authority in bankruptcy courts over truly "core" claims. *See, e.g.*, *Stern*, 131 S. Ct. at 2610–11, 2614 n.7. But it is worth commenting that the Court's hesitation to recognize and endorse the historical practice seems to rest upon a mistaken foundation from a footnote in *Granfinanciera*, where the Court appeared to back away from its earlier suggestions that *in rem* resolution of bankruptcy claims and discharge entitlement is likely a public right adjudicable by a non-Article III judge. 492 U.S. at 56 n.11. Concerned that this position had met with "substantial scholarly criticism," the Court clarified that it had never squarely so held. *Id.*

The Court's concerns over scholarly criticism were unwarranted. This purported "criticism"

consisted of only three articles. The first was a law-and-economics piece arguing that bankruptcy laws should be about the procedural negotiation of state-law property and contract rights and not involve any federally created public-rights entitlements, which obviously does not reflect the reality of bankruptcy. *See* Douglas G. Baird, *Bankruptcy Procedure and State-Created Rights: The Lessons of Gibbons and Marathon*, 1982 SUP. CT. REV. 25 (1982). The second (devoid of historical analysis) was a commentary on the already-discredited 1978 bankruptcy court system and was written before the 1984 amendments re-bifurcated bankruptcy proceedings. *See* David P. Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441 (1983). And the final article expressly states, in a single footnote in an otherwise lengthy study of jury trials, that it does not address the constitutional issue left open by *Northern Pipeline*. *See* S. Elizabeth Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 MINN. L. REV. 967, 1040 n.345. While the Court's caution was understandable, it was probably overstatement to consider these works "substantial criticism," especially in light of the overwhelming evidence of longstanding (and legitimate) acceptance of bankruptcy procedures and practices.

On the contrary, *every* lower court to decide the issue has held that the truly core functions of bankruptcy law (not the type of private-rights dispute at issue in *Stern*) are permissible matters for non-Article III adjudication under the public rights doctrine propounded by *Murray's Lessee* and its successors up through *Stern*. *See, e.g.*, *Carpenters Pension Trust Fund for N. Cal. v. Moxley*, 2013 WL 4417594, *4 (9th Cir. Aug. 20, 2013); *CoreStates Bank, N.A. v. Huls Am., Inc.*, 176 F.3d 187, 196 n.11 (3d Cir. 1999); *Kirschner v. Agoglia*, 476 B.R. 75, 79 (S.D.N.Y. 2012). Those decisions are in accord with scholars whose historical research has consistently noted the routine final adjudication of bankruptcy cases by judicial officers since the English bankruptcy commissioners. *See, e.g.*, Thomas E. Plank, *Why Bankruptcy Judges Need Not And Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567, 573, 575–80, 590–96, 600–10 (1998).

III. Constitutionally Permissible Consent May Be Implied.

As discussed above, this Court held in *Roell* that consent simpliciter suffices to permit magistrate judge adjudication and may be implied. *Roell*, 538 U.S. at 590. *Compare also* § 157(c)(2) (requiring only consent) *with* § 157(e) (requiring express consent). The Seventh Circuit's decision did not discuss *Roell* or make any argument to

overrule it, and members of the Court who found themselves in dissent in *Roell* have followed the decision as *stare decisis*. *See Gonzalez*, 553 U.S. at 251–52 (2008) (citing *Roell*'s rule of implied consent in rejecting Article III challenge to magistrate judge authority).

The bankruptcy consent scheme provides the same protections by rule that section 636(c)(2) provides by statute to parties before a magistrate judge. Like section 636(c), Rule 7012 ensures that consent is knowing and voluntary. Rule 7012(b) requires responsive pleadings to "include a statement that the party does or does not consent to entry of final orders or judgments by a bankruptcy judge." 28 U.S.C. § 636(c); Fed. R. Bankr. P. 7012(b). Thus, there is no meaningful difference between magistrate and bankruptcy judge consent. And, as *Roell* confirms, violation of a rule designed to protect consent cannot be used to lay a foundation to evade an adjudicatory outcome the defendant does not like.

To the extent the statute and only the statute were to be relevant, the presence of any arguably more specific protections in the Magistrate Act than in the bankruptcy statutes would be a product of the statutes' respective historical contexts. The magistrate provisions were enacted against an explicit congressional backdrop of fear of "coerced" consent into magistrate courtrooms. *Roell*, 538 U.S. at 589 ("It was thus con-

cern about the possibility of coercive referrals that prompted Congress to make it clear that the voluntary consent of the parties is required before a civil action may be referred to a magistrate for a final decision.") (internal quotation marks omitted). But coercion was never cited by anyone as a concern in bankruptcy. *See* 130 Cong. Rec. 6045 (1984) (remarks of Rep. Kastenmeier) (discussing consent without reference to risk of coercion). This is not surprising: bankruptcy proceedings are largely populated by repeat-player trustees (the debtors themselves are rarely involved in litigation of non-core matters). In addition, creditors, too, are often repeat-player financial institutions, in contrast to the *pro se* parties who might find themselves before a magistrate (as in *Roell*, 538 U.S. at 597 (Thomas, J., dissenting)).

More importantly, the wide swath of adjudicatory authority conferred on magistrate judges dwarfs the narrower sphere in which bankruptcy judges operate. Bankruptcy judges may only finally decide private-rights controversies "related to" a debtor's bankruptcy proceeding, 28 U.S.C. § 1334(b), and even then only upon the parties' consent, *id.* at § 157(c). Magistrate judges, by contrast, can with consent decide "any or all proceedings in a jury or nonjury civil matter . . . ." *Id.* at § 636(c)(1). They may additionally decide criminal misdemeanor matters. 18 U.S.C.

§ 3401(a). Magistrates' presence in the more constitutionally protected criminal sphere renders understandable any heightened consent protections Congress may have required.

CONCLUSION

For the foregoing reasons, as well as those briefed by Petitioner, the decision of the court below should be reversed.

Respectfully submitted,

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September 16, 2014

AMICUS CURIAE BRIEF

NO. 13-935

IN THE

Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LTD., RALPH OATES AND CATHY OATES,

Petitioners,

v.

RICHARD SHARIF,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BUSINESS LAW SECTION OF THE FLORIDA BAR IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED*

Whether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant's conduct is sufficient to satisfy Article III.

*This amicus brief does not address the first issue presented in the Petition for Certiorari.

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I. *AMICUS CURIAE*

This brief is submitted by the Business Law Section of The Florida Bar (the "Section"), pursuant to the consent of the Petitioner and Respondent, in support of neither party.[1] The Section consists of more than 5,000 members and the Section's decision to file this brief arose out of the Section's Bankruptcy/UCC Committee. It is tendered solely by the Section and supported by the separate resources of this voluntary organization–not in the name of The Florida Bar, and without implicating the mandatory membership fees paid by any Florida Bar licensee.[2]

This brief deals solely with the third issue as presented by the Petition for Writ of Certiorari: whether a bankruptcy court may, with the consent of

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[1] Attorneys authoring the brief on behalf of the Section include Paul Steven Singerman and Thomas M. Messana. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, or its counsel, made a monetary contribution intended to fund its preparation or submission. Prior to filing this brief, counsel for the Section obtained the consent of the Petitioner and Respondent to file this brief, consistent with Rule 37.

[2] This brief was reviewed by the Executive Committee of the Board of Governors of The Florida Bar on September 15, 2014, consistent with applicable standing board policies.

all parties, issue final judgments on non-core matters, including those matters mischaracterized as "core" known as *Stern* claims.[3] The Section will address no factual issue or other legal issue raised by this appeal.

For almost 30 years under the Bankruptcy Code, Florida bankruptcy courts have finally adjudicated countless fraudulent transfer actions and other adversary proceedings now classified as *Stern* claims.[4] Trying such matters once in a bankruptcy court with the consent of the parties all the while remaining subject to a constitutional challenge to the court's authority at practically any point thereafter in the appellate process would render the decision of the bankruptcy court meaningless. It would have a significant deleterious impact on the administration of justice in states such as Florida, where federal and state courts are

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[3] Congress did not develop the nomenclature "core." The term comes from the Court's reference to matters that fall within the scope of a bankruptcy court's power to enter final judgments. *Executive Benefits Ins. Agency v. Arkinson*, 134 S. Ct. 2165, 2171 n.7 (2014). But despite using the label of core, "some claims labeled by Congress as 'core,'" could not be adjudicated as such. *Id.* at 2172. Thus, the Section uses the term core to denote when a court holds constitutional authority to enter a final judgment on the matter with or without consent.

[4] "*Stern* claims" are claims categorized as "core" under 28 U.S.C. § 157(b) that, after *Stern*, present a constitutional impediment to the bankruptcy court's ability to finally adjudicate the claim.

already struggling with overcrowded dockets. Eviscerating parties' ability to consent to such matters would also impact the quality of justice by injecting uncertainty into the administration of bankruptcy estates that already have limited resources, thus impairing creditors' recoveries. Because this appeal addresses the jurisdictional underpinnings of those judgments, the Section determined that an amicus brief is appropriate.

The Section acknowledges that concern for efficient judicial administration and timely justice alone cannot trump constitutional requirements, but it does caution prudence and restraint in considering the constitutionality of important and longstanding practices built upon the Article I jurisprudence of this Court.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Much of the bankruptcy process is administrative and is conducted away from the courthouse by a bankruptcy trustee or debtor in possession. Under all chapters, a fundamental goal of the federal bankruptcy laws enacted by Congress is to give debtors a financial "fresh start" from burdensome debts. *See Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). To effectuate this goal, a trustee in a chapter 7 case must liquidate all non-exempt property, and in chapter 11 and 13 cases, a debtor in possession must propose a plan to reorganize an estate burdened with debt. Under these chapters, a debtor or trustee must maximize the recovery for creditors. Consistent with this process, the bankruptcy estate shrinks, *see* §§ 11 U.S.C. 502, 522, and grows, *see* §§ 544, 547, 548, according to the Bankruptcy Code. But in all cases, an estate is much akin to a broken water main requiring immediate repair because in order to recover property through adversary proceedings or contested matters, an estate professional hired by the trustee must expend the resources of the bankruptcy estate itself. These expenses are manifested in the form of administrative expenses.

Administrative expenses are amplified in corporate cases under chapter 11 and (sometimes in chapter 7 where there is a sale) where the goal of a trustee or debtor in possession is to maintain the viability of the business while simultaneously recovering property and resolving claims. This is

often difficult given that debtors in bankruptcy frequently do not have enough cash or other "liquid" property to sustain professional fees at the beginning stages of a case. The strategy among many estate professionals is normally to grow the estate before beginning the claims allowance process. Large, complex cases can continue for years, while smaller cases often take months.

When Congress enacted general revisions of the bankruptcy laws,[5] it gave "special attention" to making the bankruptcy laws inexpensive in their administration. *Katchen v. Landy*, 382 U.S. 323, 328 (1966) (citing H.R. Rep. No. 1228, 54th Cong., 1st Sess., p. 2; H.R. Rep. No. 1409, 75th Cong., 1st Sess., p. 2; S. Rep. No. 1916, 75th Cong., 3d Sess., p. 2). The bankruptcy laws are intended "'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period'" and include provisions for "summary disposition, 'without regard to usual modes of trial attended by some necessary delay.'" *Id.* at 328-39 (quoting *Ex parte Christy*, 44 U.S. 292, 312 (1845) and *Bailey v. Glover*, 88 U.S. 342, 346 (1874)). What is at issue now involves one of the means chosen by Congress to effectuate that purpose. It is important to keep in mind that in many bankruptcy cases, the length of time a main bankruptcy case remains open is often dependent on the status of the adversary proceedings, which often concern non-core matters.

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[5] Though the Bankruptcy Act was in effect at the time, the underlying purposes and policies were not abandoned with the adoption of the Bankruptcy Code.

The Seventh Circuit's conclusion that a bankruptcy court cannot enter a final judgment on *Stern* claims even when it has the implied consent of the parties would place a tremendous burden on the ability of bankruptcy courts to adjudicate bankruptcy cases timely and effectively. A plethora of *Stern* claims underlie many aspects of bankruptcy cases and dominate the adversary proceeding arena. If this Court were to adopt the Seventh Circuit's reading of *Stern,* the efficiency Congress legislated and achieved by the bankruptcy courts over the past four decades since the last major overhaul in 1978 would be lost. The many adversary proceedings that are timely adjudicated now in the bankruptcy courts would have to be heard by district judges. The main bankruptcy cases would be held hostage to the outcome of the bankruptcy litigation conducted in district courts that are already struggling to grant criminal defendants speedy trials and to dispose of the many other responsibilities that already burden district courts. One could reasonably expect delays in the processing of the bankruptcy lawsuits in district courts, which the bankruptcy judge in charge of the main bankruptcy case is competent to adjudicate. Moreover, an endorsement of the holding of the Seventh Circuit would likely put into serious doubt the ability of magistrate judges to fully and fairly consider matters which they are statutorily authorized to try with the parties' consent.

For the reasons that follow, this Court should conclude that parties may consent to a bankruptcy court's full adjudication of non-core matters and with

that consent, a bankruptcy court has the authority to do so. Finally, this consent may be expressed explicitly or implicitly.

III. ARGUMENT

A. Consent is Sufficient to Confer Authority in "*Stern*" Matters

Commentators noted that *Stern* shocked both bankruptcy practitioners and the judges presiding over bankruptcy matters. *See, e.g.*, Danielle Spinelli & Craig Goldblatt, *Constitutional and Statutory Limits After Executive Benefits*, 33 Am. Bankr. Inst. J., 14 (Aug. 2014); S. Todd Brown, *Constitutional Gaps in Bankruptcy*, 20 Am. Bankr. Inst. L. Rev. 179, 221 (Spring 2012) ("As one judge observed following *Marshall*, 'in exercising my delegated authority, I have entered countless orders as final without a second thought about the legitimacy of what I was doing.'"). In the years since *Stern*, the shock has faded, but questions remain. Many were hopeful that all of the issues raised by *Stern* would be answered when this Court granted certiorari in *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014),[6] but alas, a key question remains: "Can bankruptcy courts enter final judgment in matters that would otherwise require an Article III tribunal if the parties give their consent?" *Spinelli*, *supra*, at 14.

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[6] The Court's admonition that the *Stern* opinion be construed narrowly, *Stern*, 131 S. Ct. at 2620, has, unfortunately, not served to limit litigation on this issue.

To prevent further uncertainty, the Section asks that the Court address the issue of consent in a holistic manner that will not only quell doubts as to the specific circumstance presented here—of a debtor filing a voluntary petition and waiting several years to raise a *Stern* issue—but also provide a sufficiently robust framework for bankruptcy courts to address the oft-raised question of consent in its varied iterations. The Section also asks the Court to confirm its guidance to bankruptcy courts in the recent *Executive Benefits* opinion, where the Court relied upon established principles of severability and instructed bankruptcy courts to give effect to the valid provisions of the statute by following the procedures in 28 U.S.C. § 157(c) when a *Stern* claim is present. Indeed, if consent is held to be impermissible, then the statutory "gap" this Court sought to address and effectively closed in *Executive Benefits* will be reopened.

There are many circumstances beyond the filing of a voluntary petition which implicate the issue of consent. Most often, it becomes a critical issue in the context of avoidance actions, particularly fraudulent transfers. Avoidance actions often involve non-parties to the case who are made defendants in an adversary proceeding, and inevitably concern jurisdictional questions that are not, by any means, new to this Court. *See, e.g., Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932); *Stern*, 131 S. Ct. at 2609 (recognizing that "[t]his is not the first time the Court has faced an Article III challenge to a bankruptcy court's resolution of a debtor's suit").

Apropos to the considerations at hand, in *Katchen* the Court explained that in the context of the Bankruptcy Act, the bankruptcy process was expressly built around expediency. *Katchen*, 382 U.S. at 329. The policy of expediency is, in part, why the Court held a plenary action was not appropriate or necessary for the trustee in *Katchen* to bring assets into the bankruptcy estate through a preference action. *Id.* at 329-30. Though we now travel under the Bankruptcy Code, the policies and purposes of bankruptcy law have not changed.

Because the costs of administering a bankruptcy are often paid out of the bankruptcy estate itself, delay creates an expense that ultimately creditors must bear. How can delay be avoided? The answer is for this Court to provide clarity as to when and how the bankruptcy court is vested with the authority to enter final judgments. Delineating when and how a party may consent to entry of such a judgment eliminates the unnecessary delay of either waiting for review of the bankruptcy court's findings of fact and conclusions of law or seeking adjudication in the district court in the first instance.

Avoidance actions are not the only instance that the question of consent presents itself: administration of a bankruptcy case often involves settlement agreements, counter-claims, judicial sales and actions stemming wholly from the common law. The lingering question regarding the validity of consent hovers over many of these proceedings causing uncertainty. The uncertainty delays the

administration of justice because parties to any truly complex dispute will seek the district court in the first instance so as to avoid a costly "dress rehearsal" in the bankruptcy court. S. Todd Brown, *supra* at 233 (noting the increased incentive, post-*Stern*, to request a withdrawal of the reference causing greater inefficiencies in bankruptcy adjudication). The standing order of reference to the bankruptcy courts in every district plainly demonstrates that the district courts wish for these matters to be resolved in the bankruptcy court in which the related case is pending. Permitting parties to consent to entry of final judgment on non-core matters, subject to appellate review, is aligned with the policy of expediency permeating the Bankruptcy Code.

Bankruptcy courts are statutorily authorized to hear non-core matters "related to" bankruptcy cases and issue proposed findings of fact and conclusions of law. 28 U.S.C. § 157(c)(1) and (c)(2). The jurisdictional grant is, as intended, extremely broad. *Cont'l Nat'l Bank of Miami v. Sanchez (In re Toledo)*, 170 F.3d 1340, 1345 (11th Cir. 1999). This Court recognized in *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995), that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Id.* at 308 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). The real question presented now is whether bankruptcy courts have the authority to *fully* adjudicate those claims.

To some extent, 28 U.S.C. § 157 provides the answer to that question. Under § 157, bankruptcy courts are authorized to enter final judgments in core proceedings. With respect to non-core proceedings, bankruptcy courts are—absent consent of the parties—only permitted to enter proposed findings of fact and conclusions of law, which are then submitted to the district court for *de novo* review. § 157(c)(1) and (c)(2). The significance of the Court's decision in *Stern* is that bankruptcy courts no longer have authority to enter final judgments in proceedings simply because they are designated as "core" by statute. *Stern*, however, left untouched bankruptcy courts' authority to adjudicate non-core proceedings under § 157(c).

Almost thirty years ago, this Court observed that, "it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855 (1986). The issue of consent before this Court has not, in the view of the Section, changed since *Schor*.

Without belaboring the facts in *Schor*, of which the Court is aware, a futures customer, William T. Schor, filed reparations complaints with the Commodity Futures Trading Commission ("CFTC"). *Id.* at 833. In response, the broker-defendants counterclaimed to recover the debit

balance of certain accounts. The dispute came down to whether the debit balances were, as Mr. Schor alleged, the result of the defendants' violations of the Commodities Exchange Act ("CEA"), or instead, simple debt that Mr. Schor owed due to trading activity. *Id.* at 837-38. The parties litigated the matter in a CFTC reparations hearing, which consisted of discovery, briefing and a hearing, before an administrative law judge. Much like the procedural history presently before the Court, Mr. Schor did not challenge the authority of the Article I administrative law judge until after he received an adverse ruling. *Id.* at 838.

When the appeal ultimately reached this Court, two questions were considered: (1) whether the CEA, as a matter of statutory interpretation, permitted the adjudication of state-law counterclaims and (2) whether such a grant of authority would violate Article III of the United States Constitution. *Id.* 835-36. This Court held that the lower court's reading of the CEA, which would preclude the CFTB from adjudicating non-core claims, undermined its meaning, and the provision allowing parties to consent to adjudication of counterclaims passed constitutional muster—even when consent was not explicit. *Schor*, 478 U.S. at 849.

This Court, in *Schor*, noted that where serious doubts as to constitutionality arise in interpreting a federal statute, "a court should determine whether a construction of the statute is 'fairly possible' by which the constitutional question can be avoided."

Id. at 841. Indeed, the Court went on to instruct that courts should "often strain to construe legislation so as to save it against constitutional attack" but must not "carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it." *Id.* at 841 (internal punctuation and citation omitted).

Citing one of Mr. Schor's own prior filings in federal court, the Court pinpointed that reading the CEA to bifurcate proceedings would have a "crippling effect" and destroy the purpose of the CEA. *Id.* at 843-44. The Section believes that, like in *Schor*, the Seventh Circuit's reading of § 157 would serve to destroy its purpose. Though the Court is not directly addressing the validity of § 157, its meaning and purpose must be considered in order to make an adequate determination as to the nature of rights it implicates.

Section 157 establishes procedures for bankruptcy courts to follow in cases that inevitably present various kinds of claims. These procedures provide that core matters may be subject to final orders of the bankruptcy court, whereas, absent the parties' consent, non-core matters must be submitted to the district court as findings of fact and conclusions of law. The intent behind the statute is clear: the bankruptcy court can enter final orders on matters over which it has constitutional authority, and as those matters over which it lacks constitutional authority, the bankruptcy court must have the consent of both parties to enter a final judgment. The fact that this Court in *Stern* found that certain matters were—as a matter of

constitutional authority—misclassified as core does not justify the logical leap that the procedures in § 157 should be discarded; such reasoning flies in the face of the Court's holding in *Schor* that a state-law counterclaim, which carried with it all indicia of being non-core, was permissibly subject to an administrative law judge's final adjudication on the basis of consent.

The question before this Court concerning *Stern* claims is strikingly similar to its consideration of the CEA in *Schor*: *Stern* claims, like the state-law counterclaim at issue in *Schor*, can be heard in fora other than the bankruptcy court. These non-core matters, though outside the bankruptcy court's core jurisdiction, are expressly contemplated as part of the statutory scheme promoting the efficient and expedient administration of the bankruptcy estate. The items mischaracterized as core in § 157 that are now classified as *Stern* claims are all matters that traditionally are part of the administration of a bankruptcy case. By definition, these are matters that represent that limited sub-set of claims that have an impact upon a bankruptcy case. The Court favored adjudication in an Article I court in *Schor*, in part, because it concerned adjudication of matters necessary to advance the legislative purpose of creating "an inexpensive and expeditious alternative forum." *Schor*, 478 U.S. at 855. Moreover, the Court highlighted the importance of the litigant's ability to choose between final adjudication of a matter before an Article I body and pursuing the claim before an Article III court. *Id.* Concerns that Congress attempted to "withdraw from judicial cognizance"

certain claims are greatly alleviated when final adjudication of a claim in an Article I forum is the product of consent. *Schor*, 478 U.S. at 854-55. The Section perceives no difference in the present case. Non-core matters do not represent the kind of legislative fiat implicating structural, separation-of-powers concerns, but rather, are matters pursued regularly outside of bankruptcy in federal and state courts alike. The fact that Congress did not reallocate these matters from the Article III judiciary to the exclusive province of the bankruptcy courts, and established consent as the *sine qua non* for final adjudication serves to negate structural concerns. Because a litigant can designate the forum in which the matter will be subject to final judgment by the granting or withholding of consent, non-core matters plainly implicate a personal right, not a structural one.[7]

Despite the admonition to read *Stern* narrowly, particularly in respect of the aberrational fact pattern in that case, *Stern* and its progeny have had a significant impact on bankruptcy courts, litigants, and creditors alike. The Section encourages the Court to provide certainty and clarity regarding its longstanding precedent regarding consent to the adjudication of Article III-type claims. The Section

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[7] The Court's recent decisions suggest that the parties' consent to a bankruptcy court's adjudication of a *Stern* claim implicates personal rights rather than structural ones. *Stern*, 131 S. Ct. at 2625; *Executive Benefits*, 134 S. Ct. at 2171 (addressing *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)).

believes that this Court's decision in *Schor* should apply here and that the Court should clearly so hold; *Stern* perhaps raised new questions, but the analysis remains the same.[8] In answering the question presented, the Section encourages the Court to reaffirm the well-reasoned rationale and policies set forth in *Schor*, and hold that structural concerns are not implicated when parties agree—either explicitly or implicitly, to final adjudication of a non-core matter.

Ultimately, the Court's answer to this question will have a substantial impact on the day-to-day decisions of trustees, debtors-in-possession, creditors and other interested parties. If the Court holds that *Stern* claims implicate structural, separation-of-powers concerns, making the parties' consent to a full adjudication by the bankruptcy court a nullity, then certainty concerning the exercise of a bankruptcy court adjudicating a *Stern*

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[8] According to the Seventh Circuit, 28 U.S.C. § 157(c)(2) extends only to the enumerated "non-core" proceedings. *Wellness Intern. Network, Ltd. v. Sharif*, 727 F.3d 751, 772 (7th Cir. 2013). Those matters otherwise classified as "core" that this Court has called "*Stern*" claims fall into a gap that does not leave the essential attributes of judicial power to Article III courts. This analysis is flawed. It is premised on the idea that the statutory "gap" in § 157 precludes a bankruptcy court from adjudicating those "core" proceedings that fall under the rubric of *Stern* claims even if there is consent of the parties. In the view of the Section, such an interpretation would be incongruent with this Court's holding in *Executive Benefits*.

claim will be imperiled. Indeed, if a challenge may be brought at any time in the appellate process that would result in a district court having to start the litigation anew, it will cause the needless expenditure of assets of bankruptcy estates that would otherwise be used to satisfy the claims of creditors. Retrying a *Stern* claim in this manner could undoubtedly deplete a bankruptcy estate to the point that professional fees effectively swallow any benefit that creditors, and possibly equity holders, would have otherwise enjoyed.

Unlike with subject-matter jurisdiction, parties can and should be able to consent to a bankruptcy court's authority to enter a final judgment. Those cases that hold that parties cannot waive a bankruptcy court's lack of constitutional authority to enter final judgments in certain proceedings overlook the framework delineating the powers to adjudicate matters under Article I that have been long established by this Court. For example, in *Roell v. Withrow*, 538 U.S. 580 (2003), the Court held that consent to proceedings before a magistrate judge (including entry of a final judgment by the magistrate judge) can be inferred from a party's conduct during litigation—and that such consent was effective to bind the party to the magistrate judge's decision, subject to appeal.

Although the Court did not directly address the constitutionality of the Federal Magistrate Act, it could not have decided the case the way it did if it believed that such consent was unconstitutional as violative of the institutional concerns underlying

Article III, § 1. Because institutional issues under § 1, like pure subject-matter jurisdiction questions under § 2 may be raised *sua sponte*, *United States v. Cotton*, 535 U.S. 625, 630 (2002); *Stern*, 131 S. Ct. at 2601, the Court would have had to raise and decide the issue. *See Roell*, 538 U.S. at 599 (Thomas, J., dissenting). Yet, no mention of constitutionality concerns was even whispered by the majority.

The import of *Roell* should not be ignored: an interpretation of consent as the Seventh Circuit proposed would be, at best, a carve-out that contradicts the policies applied to other Article I bodies, including magistrate judges. Not surprisingly, (other than in certain habeas corpus matters) in the magistrate judge context, circuit courts have ruled consistently with their own rules, that one must timely object to a report and recommendation to preserve an issue. The Court specifically approved of the practice in *Thomas v. Arn*, 474 U.S. 140 (1985), stating that Article III was not violated.[9]

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[9] A consideration of the impact on the Bankruptcy Appellate Panels ("BAP") throughout the United States would also be necessary because if implicit consent is not effective, then the current BAP rules are likely unconstitutional. *See, e.g.*, Order Referring Bankruptcy Cases and Proceedings to Bankruptcy Judges and Authorizing Bankruptcy Appeals to be Decided by the Ninth Circuit Bankruptcy Appellate Panel, Order 312-E (S.D. Cal.) (consent is effectively presumed unless the parties affirmatively indicate otherwise).

There is no good reason why a litigant's consent to entry of a final judgment by a magistrate judge is effective to bind the party but a litigant's consent to entry of a final judgment by a bankruptcy judge is not. Both are born from Article I and so the concern about safeguarding constitutional principles applies in either case. The fact that the power of a magistrate judge to fully adjudicate claims with the consent of the parties is conferred by statute does not provide a basis for distinguishing the two situations. The Court in *Roell* left no doubt that consent can be implied by the acts of a party. *See also Peretz v. United States*, 501 U.S. 923, 937 (1991) (finding no Article III issue with parties consenting to a magistrate judge conducting *voir dire* in a felony trial because "the entire process takes place under the district court's total control and jurisdiction") (internal quotation marks omitted). No distinction can be made to preclude the application of these decisions in the context of bankruptcy. Holding that § 157 does not permit consent because it implicates separation-of-powers-issues would be inconsistent with this Court's decision in *Roell*—that the parties can effectively consent, explicitly or implicitly, to an Article I court's authority to fully adjudicate non-core matters before it.

The guarantee of an independent and impartial judiciary serves primarily to protect personal interests, and so it "is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Schor*, 478 U.S. at 848-49 (citations omitted). To hold that *Stern* claims—

which, by definition, are claims that although not "core" are nevertheless related to the bankruptcy case—do not fall under the personal right rubric, would introduce significant uncertainty as to this Court's holding in *Schor*.

If the Court holds that a party may not waive through consent an Article III, § 1-type objection, the immediate effect will be to cause dissatisfied parties to seek another bite at the apple.[10] The long-term

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[10] *See Roell*, 538 U.S. at 590 (holding that "[i]nferring consent in these circumstances thus checks the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the magistrate judge's authority[;] [j]udicial efficiency is served; [and] the Article III right is substantially honored"); *Wellness*, 727 F.3d at 755 (noting that the defendant did not raise a *Stern* objection in his district court appeal, but instead waited for his sister to file a motion to withdraw the reference months later); *Exec. Benefits Ins. Agency, Inc. v. Arkison (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553, 568 (9th Cir. 2012) (stating that the defendant "waited so long to object, and in light of its litigation tactics, we have little difficulty concluding that [defendant] impliedly consented to the bankruptcy court's jurisdiction"); *Finley v. Carrington Mortg. Servs., LLC*, No. 12-S-00051-NE, 2012 WL 6610194, at *3 (N.D. Ala. Dec. 17, 2012) (recognizing that "[u]nfortunately, *Stern* has become the refuge for strategic-minded defendants who have sought to use [it] to prolong and/or obfuscate litigation" and "has developed into the mantra of every litigant who, for strategic or tactical reasons, would rather litigate somewhere other than the bankruptcy court") (internal quotation marks and citations omitted); *Haley v. Barclays Bank of Del. (In re Carter)*, 506 B.R. 83,

effect will be to cause all parties involved in a non-core matter to seek the district court in the first instance—because an agreement of the parties as to consent would be meaningless.

There are many reasons why these effects should not occur. To name a few, adding to the district courts' dockets the many matters that would otherwise be before bankruptcy courts would create a tremendous administrative burden. *See* Grant Hermes, *A Uniform Federal Judiciary Enables Bankruptcy Courts to Bring Relief to Debtors and Creditors*, 34 Whittier L. Rev. 261, 771-73 (Winter 2013). Bankruptcy courts have administrative and

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88 (Bankr. D. Ariz. 2014) (noting the gamesmanship of a party who simultaneously moved for summary judgment and objected to entry of a final judgment against it on *Stern* grounds, "it is difficult to understand how both the objection to final judgment and the request for entry of final judgment could have been filed in compliance with Rule 9011(b)"); *Adams Nat'l Bank v. GB Herndon & Assocs., Inc. (In re GB Herndon & Assocs., Inc.)*, 459 B.R. 148, 158 (Bankr. D.D.C. 2011) (holding that the defendants waiting until after the bankruptcy court entered a final judgment against them to raise a *Stern* objection amounted to "sandbagging" which resulted in waiver of their right to an Article III adjudication); *Res. Funding, Inc. v. Pacific Cont'l Bank (In re Washington Coast I, LLC)*, 485 B.R. 393, 409 (B.A.P. 9th Cir. 2012) (concluding that the defendant "litigated in the adversary proceeding for over two years and only raised the issue regarding the bankruptcy court's authority to enter the final judgment after an adverse ruling and for the first time on appeal").

functional expertise in handling, at times, hundreds of filings in a short span of time. *See, e.g., In re TOUSA, Inc.*, et al. No. 08-10928-JKO (Bankr. S.D. Fla.) (1,614 adversary proceedings filed); *In re Rothstein, Rosenfeldt, Adler, P.A.*, No. 09-34791-RBR (Bankr. S.D. Fla.) (152 adversary proceedings filed); *In re Winn-Dixie Stores, Inc.*, et al., No. 05-038170-JAF (Bankr. M.D. Fla.) (117 adversary proceedings filed); *In re Taylor, Bean & Whitaker Mortgage Corp.*, et al. No. 09-07047-JAF (Bankr. M.D. Fla.) (417 adversary proceedings filed). In 2012 and 2013, more than 90,000 adversary proceedings were filed in the bankruptcy courts.[11]

Bankruptcy courts also serve an integral role in providing particularized adjudication of creditor and debtor rights, and are familiar with the background of the debtor and can visualize how all of the moving pieces fit together. Indeed, the value of the bankruptcy forum is that it provides a system capable of expeditious review in a specialized arena. *Granfinanciera*, 492 U.S. at 75 n.4 (White, J., dissenting). Bankruptcy courts often hold motion calendar on a daily basis, with any number of federal and state law issues presented for determination.[12]

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[11] Admin. Office of the U.S. Courts, U.S. Bankr. Courts – Adv. Proc. Commenced, Terminated, & Pending Under the Bankruptcy Code During the 12-Month Periods Ending Sept. 30, 2011 and 2012, available at www.uscourts.gov/uscourts, Statistics, Judicial Business, U.S. Bankr. Courts-Adversary Proceedings (Table F-8).

[12] *See, e.g.*, U.S. Bankr. Ct., S. Dist. of Fla., Court Calendars *available at* http://www.flsb.uscourts.gov/.

Indeed, Justice Breyer recognized that "the volume of bankruptcy cases is staggering, involving almost 1.6 million filings last year, compared to a federal district court docket of around 280,000 civil cases and 78,000 criminal cases." *Stern*, 121 S. Ct. at 2630 (Breyer, J., dissenting (citing 2010 statistics)).

To deal effectively with the large caseload, courts in various districts have implemented local rules and forms addressing a party's consent to bankruptcy court adjudication in adversary proceedings. All of the judges in the United States Bankruptcy Court for the Southern District of Florida utilize a standard pre-trial order which provides that a party's failure to object within ten days of the first pretrial conference constitutes consent to a bankruptcy court's adjudication:

> OBJECTION TO ENTRY OF FINAL ORDERS AND JUDGMENTS BY THE BANKRUPTCY COURT; CONSENT. Not later than ten (10) days before the date first set for the pretrial conference in the summons each party objecting to the entry of final orders or judgments by this court on any issue in this proceeding, whether or not designated as "core" under 28 U.S.C. §157(b), shall file with this court a motion requesting that this court determine whether this proceeding is a core proceeding or otherwise subject to the entry of final orders or judgments by this court. Any such motion shall be treated as an objection to the entry of final orders or judgments by this court. FAILURE OF ANY PARTY TO FILE A MOTION ON OR BEFORE THE DEADLINE PROVIDED IN THIS PARAGRAPH SHALL CONSTITUTE

> CONSENT BY SUCH PARTY TO THIS COURT ENTERING ALL APPROPRIATE FINAL ORDERS AND JUDGMENTS IN THIS PROCEEDING. Nothing in this paragraph limits this court's ability to determine *sua sponte* whether this proceeding is a core proceeding under 28 U.S.C. §157(b)(3) or otherwise subject to entry of final orders or judgments by this court.

Order Setting Filing and Disclosure Requirements for Pretrial and Trial, Form CGFI19 (Bankr. S.D. Fla.). Surely, if a debtor submits to the bankruptcy court by filing a voluntary petition, asserting claims or counter-claims, or otherwise subjects itself to the adjudication of a matter with an evident aim to receive a final order, it has effectively consented to the entry of a final judgment by the bankruptcy court. This is particularly true in courts such as the Bankruptcy Court for the Southern District of Florida, which, as explained above, have expressly outlined what actions, or inaction by failing to object, constitutes consent.

Severing bankruptcy from the long-standing consent jurisprudence in related magistrate judge cases recognizing implied consent would carry with it increased costs due to the delay in bifurcating a bankruptcy case between the bankruptcy court and the district court. Consent should not be transformed into an opportunity for gamesmanship to be exploited by disgruntled parties. Nor should the Court, through an overbroad reading of Article III, § 1, impose added burdens on the judiciary, bankruptcy estates and their creditors, who would

become the ultimate victims of unwinding a non-core matter after bankruptcy court adjudication.

IV. CONCLUSION

In the end, if the Court holds that parties cannot consent to a bankruptcy court entering a final judgment and thereby waiving a *Stern* objection, then the prompt and orderly administration of bankruptcy cases will be in jeopardy. The Section urges the Court to reverse the decision of the Seventh Circuit, and to preserve the efficacy of parties' consent to bankruptcy court adjudication of *Stern* claims.

Respectfully submitted this 16th day of September, 2014.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 13-935

Supreme Court, U.S.
FILED
NOV 26 2014
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LIMITED, *et al.*,

Petitioners,

v.

RICHARD SHARIF,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF CERTAIN *TOUSA* DEFENDANTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

This Court held in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), that non-Article III bankruptcy courts cannot finally adjudicate certain claims despite their designation as "core" under 28 U.S.C. § 157. The petition for writ of certiorari in this case presents the question whether litigants nevertheless may consent to the exercise of such authority by bankruptcy courts and, if so, whether such consent may be implied by their conduct. *Amici* will address the following two questions:

1. Whether "implied consent" to the exercise of authority barred by *Stern* is sufficient in light of Federal Rule of Bankruptcy Procedure 7012(b)'s requirement that in non-core proceedings bankruptcy courts can enter final orders and judgments only with the express consent of the parties; and

2. Whether "implied consent" to the exercise of authority barred by *Stern* can be derived solely from the fact that the litigants did not expressly challenge the bankruptcy court's authority before *Stern* was decided.

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*

The *amici curiae* are members of a group of defendants referred to as the "Transeastern Lenders" in a case currently pending before the United States District Court for the Southern District of Florida, *SV Capital Master Fund Ltd. v. Official Committee of Unsecured Creditors of TOUSA, Inc. (In re TOUSA, Inc.)*, Case No. 10-62035-CIV-Moore (the "TOUSA Litigation").[1] The TOUSA Litigation began in July 2008 when the Official Committee of Unsecured Creditors (the "Committee") of TOUSA, Inc. ("TOUSA"),[2] a Florida homebuilder that filed for bankruptcy protection in January 2008, filed an adversary proceeding against the Transeastern Lenders and two other groups of defendants on behalf of certain TOUSA subsidiaries. The Committee alleged, *inter alia*, that certain transfers made by the TOUSA subsidiaries were fraudulent transfers under 11 U.S.C. §§ 544, 548, and Florida and New York law. (*See* Case No. 08-01435-JKO, ECF No. 243.) The bankruptcy court issued a purported

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1. All parties have been timely notified of the undersigned's intent to file this brief; both petitioners and respondent have consented to the filing of this brief. Respondent has filed with the Court a letter consenting to the filing of *amicus curiae* briefs in support of either or neither party. A copy of petitioners' consent is filed herewith. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The *amici curiae* are identified in the attached appendix.

2. The Committee is the predecessor of the current appellee the Liquidation Trustee.

final judgment in favor of the Committee against the Transeastern Lenders (and other defendants), but the district court, reviewing legal determinations *de novo* and findings of fact under a clear error standard, "quashed" the judgment and found the Transeastern Lenders not liable. *See generally In re TOUSA, Inc.*, 422 B.R. 783 (Bankr. S.D. Fla. 2009); *In re TOUSA, Inc.*, 444 B.R. 613 (S.D. Fla. 2011). The Committee appealed the district court's decision to the Eleventh Circuit.

This Court decided *Stern* six days after the Transeastern Lenders submitted their opposition brief before the Eleventh Circuit. Although the Transeastern Lenders filed a letter pursuant to Federal Rule of Appellate Procedure 28(j) advising the court of *Stern* prior to scheduling of oral argument, the Eleventh Circuit reviewed the bankruptcy court's judgment using a deferential standard as though it were a final judgment. The Eleventh Circuit made no mention of *Stern* in its decision. The Eleventh Circuit affirmed the bankruptcy court judgment as to liability and remanded the case to the district court to review the bankruptcy court's remedial scheme. *See In re TOUSA, Inc.*, 680 F.3d 1298, 1316 (11th Cir. 2012). The Eleventh Circuit stated that it was reviewing the bankruptcy court's judgment "independently of the district court," reviewing the bankruptcy court's factual findings for clear error and its equitable determinations for abuse of discretion. *Id.* at 1310 ("The factual findings of the bankruptcy court are not clearly erroneous unless . . . we are left with the definite and firm conviction that a mistake has been made. Neither the district court nor this Court is authorized to make independent factual findings; that is the function of the bankruptcy court.") (internal citations and quotation

marks omitted). The Transeastern Lenders subsequently filed a petition for rehearing, again raising the issue of *Stern*'s applicability to the TOUSA Litigation. The Eleventh Circuit denied the petition without comment.

This Court's decisions in *Stern* and *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014) ("*Executive Benefits*"), clearly affect a bankruptcy court's ability to finally adjudicate fraudulent transfer claims against defendants like the Transeastern Lenders—defendants that (except for one former Transeastern Lender that since settled its liability) did not file proofs of claim against the bankruptcy estates. Such defendants have a right to Article III adjudication of the claims asserted against them. The bankruptcy court may enter proposed findings of fact and conclusions of law to be reviewed by the district court *de novo*, but the bankruptcy court does not have authority to enter a final judgment on those claims. Accordingly, under the standard recently articulated by this Court, the district court decision reviewing the bankruptcy court's order should have been the final judgment in the TOUSA Litigation,[3] and the Eleventh Circuit should have reviewed that decision with deference. It should not have reviewed the bankruptcy court order "independently" of the district court judgment.

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3. By finding that the bankruptcy court's factual findings were clearly erroneous, the district court necessarily would have reached the same conclusion if it had exercised its own independent judgment as to the factual record, as *Executive Benefits* requires. Stated differently, the district court's findings and judgment of no liability for the Transeastern Lenders would have necessarily been the same if the district court had reviewed the bankruptcy court judgment *de novo* rather than deferentially.

The Transeastern Lenders agree with respondent that litigants cannot consent to the adjudication of a private right by a non-Article III court (*see* Resp. Br. at 39-49),[4] but submit this brief to address two discrete issues: (1) whether, assuming *arguendo* that a party can consent to adjudication of a private right by an Article III court, such consent must be express; and (2) whether, assuming this Court finds that consent could be either express or implied, such consent can be implied from the mere fact that a litigant did not argue, prior to this Court's decision in *Stern*, that the bankruptcy court's exercise of final adjudicative authority expressly provided for in the Bankruptcy Code was unconstitutional.

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4. *See also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850-51 (1986) (stating that "Article III, § 1 safeguards the role of the Judicial Branch" and prevents "the encroachment or aggrandizement of one branch at the expense of the other" and "[t]o the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III"); *Waldman v. Stone*, 698 F.3d 910, 918 (6th Cir. 2012) ("Waldman's objection [that the bankruptcy court lacked constitutional authority to enter judgment] thus implicates not only his personal rights, but also the structural principle advanced by Article III. And that principle is not Waldman's to waive."), *cert. denied*, 133 S. Ct. 1604 (2013); *BP RE, L.P. v. RML Waxahachie Dodge, L.L.C. (In re BP RE, L.P.)*, 735 F.3d 279, 286 (7th Cir. 2013) (adopting "the compelling and thorough reasoning of *Waldman*, which held that parties cannot consent to such circumvention of Article III that impinges on the structural interests of the Judicial Branch."), *reh'g en banc denied*, 744 F.3d 1371 (7th Cir. 2014).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Seventh Circuit held below that, under this Court's decision in *Stern*, bankruptcy courts do not have the authority to enter final judgments on alter-ego claims. *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 775-76 (7th Cir. 2013) ("*Wellness*"), Pet'r's. App. 51a. The court further held that "a constitutional objection based on *Stern* is not waivable because it implicates separation-of-powers principles." *Id.* at 755, Pet'r's. App. 3a. If this Court were to reverse the Seventh Circuit's holding that a constitutional objection based on *Stern* is not waivable, the Court nevertheless should hold that only express consent, rather than implied consent, is sufficient to confer jurisdiction on a bankruptcy court to enter final judgment on a *Stern* claim.

The *Executive Benefits* Court held that a *Stern* claim should be treated as non-core under 28 U.S.C. § 157(c). 134 S. Ct. at 2173. In non-core proceedings, under Federal Rule of Bankruptcy Procedure 7012(b), express consent of the parties is required to confer jurisdiction on the bankruptcy court to enter a final judgment. The Advisory Committee notes to Federal Rules of Bankruptcy Procedure 7012(b) and 7008 reiterate that consent must be express. The Ninth Circuit erred in holding to the contrary in *Executive Benefits*. Relying on this Court's decision in *Roell v. Withrow*, 538 U.S. 580 (2003), the Ninth Circuit held that Rules 7008 and 7012 do not preclude a finding of implied consent. *See Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency)*, 702 F.3d 553, 568-69 (9th Cir. 2012) ("*Bellingham*"). But *Roell* is inapplicable. In *Roell*, this Court held that with regard

to 28 U.S.C. § 636(c)(1), which provides that a magistrate judge may enter a final order where designated to do so by the district court "upon the consent of the parties," a court may "accept implied consent where . . . the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge." *Roell*, 538 U.S. at 590. The Ninth Circuit was mistaken in extending the reasoning of *Roell* to *Bellingham* for three reasons. First, *Roell* held that as a matter of *statutory* construction implied consent may satisfy § 636(c)(1). Second, *Roell* did not address or interpret the Bankruptcy Code or Federal Rules of Bankruptcy Procedure. Third, the *Roell* Court warned that consent should only be implied in limited, exceptional circumstances such as those in the case.

The United States, as *amicus curiae* supporting petitioners, has suggested that respondent knowingly waived his constitutional right by asking the bankruptcy court—prior to the decision in *Stern*—to rule on the alter-ego claim. The United States argued that such action, although not express, constituted knowing waiver because "the principal building blocks of *Stern*'s reasoning were contained in the Court's 1989 decision in *Granfinanciera*, which is why the parties in *Stern* had been litigating about the question for more than a decade." (Br. of United States as *Amicus Curiae* in Supp. of Pet'r at 30-31, *Wellness Int'l Network, Ltd. v. Sharif*, 134 S. Ct. 2901 (2014) (No. 13-935) ("United States Br.").) Even if this Court were to conclude that consent can be implied, the Court should hold that Sharif's failure to raise a *Stern* objection before *Stern* was decided did not constitute consent. Under this Court's precedents, and as a matter of common sense and fairness, the failure to assert a right before the law recognizes such right cannot be considered a knowing

and intelligent waiver of that right. Before *Stern*, Sharif was litigating in the face of a statute that unambiguously stated that the bankruptcy court had authority to enter a final judgment. He had no reasonable basis on which to object. Sharif did not knowingly consent to the bankruptcy court's exercise of unlawful authority by failing to raise an argument that contradicted existing statutory law prior to this Court's decision in *Stern*. The failure to assert a presently-nonexistent right cannot be a knowing waiver of that right.

ARGUMENT

I. A Litigant's Consent To A Bankruptcy Court Entering Final Judgment On A Private Right Claim Must Be Express

If this Court were to reverse the Seventh Circuit and hold that a party can consent to a bankruptcy court entering final judgment on a private right claim, which it should not do, it should make clear that such consent must be express and cannot be implied.

A. A Bankruptcy Court Cannot Enter A Final Judgment In A Non-Core Proceeding Without Express Consent Of The Parties

In *Executive Benefits*, this Court held that 28 U.S.C. § 157 "permits *Stern* claims to proceed as non-core within the meaning of § 157(c)." 134 S. Ct. at 2173. The Bankruptcy Code provides that, for non-core proceedings, "the consent of all the parties to the proceeding" is required before the district court can refer a non-core proceeding to the bankruptcy court to enter a final judgment. 28 U.S.C. § 157(c)(2). The Federal Rules of Bankruptcy Procedure

clarify that the consent must be express: "in non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the *express consent* of the parties." Fed. R. Bankr. P. 7012(b) (emphasis added). The 1987 Advisory Committee notes to Rule 7012(b) reiterate the point: "[a] final order or judgment may not be entered in a non-core proceeding heard by a bankruptcy judge unless all parties *expressly consent*." Fed. R. Bankr. P. 7012 (1987 adv. comm. note) (citing 28 U.S.C. § 157(c)) (emphasis added). Furthermore, Federal Rule of Bankruptcy Procedure 7008 requires that "[i]n an adversary proceeding before a bankruptcy judge [complaints or the like] shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgments by the bankruptcy judge" and the 1987 Advisory Committee notes to the rule again reiterate the need for express consent: "[f]ailure to include the statement of consent does not constitute consent. *Only express consent* in the pleadings or otherwise is effective to authorize entry of a final order or judgment by the bankruptcy judge in a non-core proceeding." Fed. R. Bankr. P. 7008 (1987 adv. comm. note) (emphasis added).

The bankruptcy rules are not mere suggestions—they are imperatives. *See Kontrick v. Ryan*, 540 U.S. 443 (2004) (Federal Rules of Bankruptcy Procedure are mandatory); *see also Bank of N.S. v. United States*, 487 U.S. 250, 255 (1988) ("[I]n every pertinent respect, . . . [a Federal Rule of Criminal Procedure is] as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions."). Accordingly, only express consent by all litigants can allow a bankruptcy court to enter a final judgment in a non-

core proceeding involving *Stern* claims. *See Weisfelner v. Blavatnik (In re Lyondell Chem. Co.)*, 467 B.R. 712, 722 (S.D.N.Y. 2012) (stating that in light of Federal Rule of Bankruptcy Procedure 7012(b) "mere implied consent appears to be insufficient"); *Messer v. Bentley Manhattan Inc., LLC (In re Madison Bentley Assocs.)*, 474 B.R. 430, 436 (S.D.N.Y. 2012) (same); *Penson Fin. Servs. v. O'Connell (In re Arbco Capital Mgmt., LLP)*, 479 B.R. 254, 266-67 (S.D.N.Y. 2012) ("The Bankruptcy Code, as amended in 1987, however, requires 'express consent of the parties' for a bankruptcy judge to enter final orders and judgment in non-core matters.... Furthermore, 'present law seems to mandate that parties must expressly consent to the entry of a final order by the bankruptcy court in the determination of non-core matters.'") (citations and internal punctuation omitted); *Pryor v. Tromba*, No. 13-CV-676, 2014 U.S. Dist. LEXIS 47969, at *21 (E.D.N.Y. Apr. 7, 2014) ("The Bankruptcy Code, however, requires 'express consent of the parties' for a bankruptcy judge to enter final orders and judgments in non-core matters.").

B. The Ninth Circuit's Holding That Implied Consent Is Sufficient Ignores The Plain Language Of The Federal Rules Of Bankruptcy Procedure

The Ninth Circuit's decision in *Bellingham* is the only circuit court decision to hold that implied consent is sufficient despite Federal Rules of Bankruptcy Procedure 7008 and 7012's requirement of express consent.[5] 702 F.3d at 568-69. The Ninth Circuit relied on this Court's

5. This Court did not reach the issue of consent in *Executive Benefits* and thus had no reason to address this argument. 134 S. Ct. at 2170 n.4.

decision in *Roell* and reasoned that *Roell* precluded an objection on the basis of the bankruptcy rules. *Id.* The Ninth Circuit erred.

In *Roell*, this Court held that implied consent may satisfy 28 U.S.C. § 636(c)(1), which governs the jurisdiction of magistrate judges and speaks only of the "consent of the parties, without qualification as to form." 538 U.S. at 586-87 (internal quotation marks omitted).[6] In holding that *Roell* precluded any objection based on the bankruptcy rules, the Ninth Circuit compared § 636(c) with § 157(c) and noted that neither provision specified that consent had to be express. *Bellingham*, 702 F.3d at 569. But the Ninth Circuit was mistaken in extending the reasoning of *Roell* to *Bellingham*. First, *Roell* merely held that—as a matter of *statutory* construction—implied consent may satisfy 28 U.S.C. § 636(c)(1). *Roell*, 538 U.S. at 586-87 ("the only question" is whether implied consent "can count as conferring 'civil jurisdiction' under § 636(c)(1), or whether adherence to the letter of § 636(c)(2) is an absolute demand"); *see id* at 587 n.5.[7] The *Roell* Court had no occasion to address whether implied consent would satisfy Article III concerns.

Second, *Roell* did not address or interpret the Bankruptcy Code or Federal Rules of Bankruptcy Procedure, which make clear that express consent

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6. Notably, four justices dissented and rejected the majority's conclusion that implied consent sufficed. *See id.* at 592 (Thomas, J., dissenting, joined by Stevens, Scalia, and Kennedy, JJ.).

7. Section 636(c) also states that its provisions are "[n]otwithstanding any provision of law to the contrary. 28 U.S.C. § 636(c). There is no equivalent language in § 157.

is required. Instead, *Roell* addressed the Federal Magistrates Act, specifically, 28 U.S.C. § 636(c)(1). The *Roell* Court reached the conclusion that implied consent could satisfy § 636(c)(1) only after determining that implied consent was consistent with "the text and structure of [§ 636] as a whole." *Id.* at 587. Although § 636 and § 157 are similar in many respects, § 636 provides numerous protections to ensure that consent is given knowingly and voluntarily. Not only does § 636(c) require litigant consent, it also provides that a litigant's decision to consent (or not to consent) is reported only to the clerk and while the statute permits judges to remind litigants of the referral option, it requires them also to "advise the parties that they are free to withhold consent without adverse substantive consequences." 28 U.S.C. § 636(c)(2). Accordingly, the *Roell* Court observed that a litigant's personal "Article III right is substantially honored" by those safeguards. *Roell*, 538 U.S. at 590. The Bankruptcy Code contains none of these safeguards included in the Federal Magistrate Act or any other similar measures to ensure that waiver is voluntary.

Finally, this Court cautioned in *Roell* that consent should be implied only in limited, exceptional circumstances. *Id.* at 591 n.7 ("implied consent will be the exception, not the rule, since . . . district courts remain bound by the procedural requirements of § 636(c)(2) and Federal Rule of Civil Procedure 73(b)"). In *Roell*, the party raising the constitutional objection (Withrow) had expressly consented and then waited until after he lost at trial to argue that the magistrate judge lacked authority to enter a final judgment because the *prevailing party* had not expressly consented to adjudication by the magistrate. *Id.* at 582-84. The Court had no opportunity to address a

situation in which the *complaining party* did not consent to adjudication by a non-Article III court. In addition, the two parties who originally did not expressly consent (Roell and Garibay), "'clearly implied their consent' by their decision to appear before the Magistrate Judge, without expressing any reservation, after being notified of their right to refuse and after being told that she intended to exercise case-dispositive authority" and then later indicated their express consent by filing a formal letter of consent with the district court after the case was remanded from the court of appeals to the district court. *Id.* at 583-84, 586; *see also id.* at 584 n.1 ("On at least three different occasions, counsel for Roell and Garibay was present and stood silent when the Magistrate Judge stated that they had consented to her authority."). What the Court referred to as "implied consent" from Roell and Garibay was implied from circumstances far different from those at issue in *Wellness* or the TOUSA Litigation where the parties were not even aware they had a right to a final adjudication before an Article III court.

As a result, the *Roell* Court was particularly concerned about a litigant sandbagging and belatedly raising an argument concerning a magistrate's authority as a tactical maneuver. *See id.* at 589-90. This Court limited its holding in *Roell* by noting that:

> the better rule is to accept implied consent where, as here, the litigant or counsel was made aware of the need for consent and the right to refuse it and still voluntarily appeared before the Magistrate Judge. Inferring consent *in these circumstances* thus checks the risk of gamesmanship by depriving parties of the

> luxury of waiting for the outcome before denying the magistrate judge's authority.

Id. at 590 (emphasis added).

Because the Federal Rules of Bankruptcy Procedure require express consent, this Court should reject the suggestion that a litigant can impliedly consent to a bankruptcy court entering final judgment on a private right claim.

II. A Party Cannot Knowingly Waive A Right That Does Not Exist By Not Asserting It

If the Court nonetheless were to conclude that a party can impliedly consent to the bankruptcy court entering final judgment on a private right claim, the Court should require that such waiver be knowing and unequivocal. Importantly, the Court should make clear that the fact that a party did not raise a *Stern* objection before *Stern* was decided does not provide the requisite knowing consent.

A. Waivers Of Constitutional Rights Should Not Lightly Be Inferred

As a general matter, "courts closely scrutinize waivers of constitutional rights, and 'indulge every reasonable presumption against a waiver.'" *Sambo's Rests., Inc. v. City of Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981) (citing *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389 (1937)). Courts have long held that "an effective waiver must . . . be one of a 'known right or privilege.'" *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143 (1967) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *see, e.g., Roell*, 538 U.S. at 590 (where consent was an explicit feature of the Federal

Magistrates Act, the Court repeatedly emphasized that litigants must voluntarily consent to proceed before a magistrate with awareness of the "need to consent and the right to refuse it"); *Brady v. United States*, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.").

B. Litigants In Pending Cases Can Raise Arguments That Arise Upon Changes In The Law

Courts have also held that where there is an intervening change in the law, an exception to normal waiver rules "exists to protect those who, despite due diligence, fail to prophesy a reversal of established adverse precedent." *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 374 (6th Cir. 2007). As this Court held in *Curtis Publishing*, a party does not waive a "known right" simply by failing to assert the right before it was recognized in a subsequent decision. 388 U.S. at 143-45; *see also Hormel v. Helvering*, 312 U.S. 552, 558-59 (1941) (exception to waiver exists in "those [cases] in which there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result"). Federal circuits have repeatedly reiterated this point: "Where the Supreme Court decides a relevant case while litigation is pending . . . omission of an argument based on the Supreme Court's reasoning does not amount to a waiver." *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 390 (7th Cir. 2004).[8]

8. *See also Ray v. UNUM Life Ins. Co. of Am.*, 314 F.3d 482, 487 (10th Cir. 2002) ("[A]n intervening change in the law

"[T]he doctrine of waiver demands conscientiousness, not clairvoyance, from parties," and thus a party should be allowed to assert a new objection on appeal when there is a "changed legal landscape." *Hawknet*, 590 F.3d at 92-93.

These well-known principles reflect a fundamental principle of fairness—a litigant "can hardly be faulted for failing to raise an argument before there was legitimate legal support for such an argument." *Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 516 (6th Cir. 2006). In addition, there is a practical reason

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permits appellate review of an issue not raised below."); *Forshey v. Principi*, 284 F.3d 1335, 1356 (Fed. Cir. 2002) ("[D]ecision of an issue not decided or raised below is permitted when there is a change in the jurisprudence of the reviewing court or the Supreme Court after consideration of the case by the lower court."); *Big Horn Cnty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000) (rejecting waiver theory and applying principles from intervening decision where plaintiff altered its stance once decision was issued, noting "an exception to the waiver rule exists for intervening changes in the law"); *DSC Commc'ns Corp. v. Next Level Commc'ns*, 107 F.3d 322, 326 n.2 (5th Cir. 1997) (applying principles from case decided after oral argument, stating "[w]e are unwilling to ignore this important clarification of the law, and perpetuate incorrect law, merely because [the case] was decided after briefing and oral argument in this case"); *Gucci Am. v. Bank of China*, 768 F.3d 122, 135 (2d Cir. 2014) ("While arguments not made in the District Court are generally waived, 'a party cannot be deemed to have waived objections or defenses which were not known to be available at the time they could first have been made'") (quoting *Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 92 (2d Cir. 2009)) (internal citation omitted); *Schaff v. R.W. Claxton, Inc.*, 144 F.2d 532, 533 (D.C. Cir. 1944) (finding that the "appellant did not have a fair chance to raise and press at the trial" an argument based on a decision in another case issued after the trial).

for having such an exception to the normal waiver rules. Without such an exception, "[p]arties would be forced to . . . litter their pleadings with every argument which might conceivably be adopted during the pendency of a proceeding." *Id.* Waiver rules certainly were not intended to have such consequences.

C. *Stern v. Marshall* Was An Intervening Change In The Law

Congress granted to the bankruptcy courts under 28 U.S.C. § 157(b)(1) the authority to "hear and determine . . . all core proceedings" and "enter appropriate orders and judgments." 28 U.S.C. § 157(b)(1). Section 157(b)(2) provides a non-exclusive list of "core" proceedings that includes "counterclaims by the estate against persons filing claims against the estate," at issue in *Stern*. 28 U.S.C. § 157(b)(2). The Seventh Circuit in *Wellness* proceeded as if the alter-ego claim at issue was a core claim that the bankruptcy court had statutory authority to enter final judgment on because the parties did not argue otherwise. *See Wellness*, 727 F.3d at 762, Pet'r's. App. 20a-21a.h. *Stern* effected a change in the existing positive law by declaring that—despite the plain language of § 157(b)—bankruptcy courts lack constitutional authority to enter final judgments on state law counterclaims that would not be resolved in the process of ruling on a creditor's proof of claim. *Stern*, 131 S. Ct. at 2620.

Despite relying on past precedent—primarily *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989)—"*Stern* goes further than both those cases." *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 462 B.R. 457, 468 (S.D.N.Y.

2011). *Northern Pipeline* held that the assignment of state-law contract claims to bankruptcy courts under the Bankruptcy Act of 1978 violated Article III of the Constitution. 458 U.S. at 87. A majority of this Court agreed that the state-law contract claims at issue did not involve "public rights" that could be delegated to bankruptcy courts for resolution, but a majority of the Court was unable to agree on the confines of the public rights exception. *Id.* at 69-72.

Seven years later in *Granfinanciera*, this Court held that a non-creditor defending against a fraudulent transfer claim brought by a bankruptcy estate was entitled to a jury trial under the Seventh Amendment. 492 U.S. at 58-59, 64. This Court held that "[a]lthough the issue admits of some debate, a bankruptcy trustee's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2) seems to us more accurately characterized as a private rather than a public right," because such claims are "quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Id.* at 55-56. Significantly, *Granfinanciera* did not hold that any portion of § 157 was unconstitutional or that bankruptcy courts could not finally adjudicate fraudulent transfer claims. In fact, this Court stated explicitly that it was not "express[ing] any view as to whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges."[9] *Id.* at 64.

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9. The overwhelming majority of courts, including numerous circuit courts, assumed the constitutionality of Section 157(b)(2) long after *Granfinanciera*. *See, e.g., Turner v. Davis, Gillenwater*

In *Stern*, a majority of the Court found that the state-law counterclaim at issue was indistinguishable from the fraudulent conveyance claim in *Granfinanciera*: "Vicki's counterclaim—like the fraudulent conveyance claim at issue in *Granfinanciera*—does not fall within any of the varied formulations of the public rights exception in this Court's cases." *Stern*, 131 S. Ct. at 2614. Accordingly, the Court held that § 157(b)(2)(C), by authorizing bankruptcy courts to enter final judgments on such state law counterclaims, violated Article III of the Constitution. *Id.* at 2608, 2616, 2620. "*Stern* represent[ed] the first time a solid majority of the Supreme Court ha[d] applied the categorical, historical approach to limit the final adjudicative authority of the Bankruptcy Court following the 1984 Act." *Dev. Specialists*, 462 B.R. at 468.

The *Stern* Court explicitly acknowledged that its decision was a departure from certain assumptions in prior decisions: "In past cases, we have suggested that a proceeding's 'core' status alone authorizes a bankruptcy

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& Lynch (In re Inv. Bankers), 4 F.3d 1556, 1561 (10th Cir. 1993) (concluding that "the bankruptcy court's determination of the trustee's preference and fraudulent conveyance claims did not violate Article III" and that "[o]ther courts have similarly concluded that the bankruptcy courts have authority to preside over preferential and fraudulent transfer proceedings") (citations omitted); *Sigma Micro Corp. v. Healthcentral.com (In re Healthcentral.com)*, 504 F.3d 775, 787 (9th Cir. 2007) ("canvass[ing] the numerous courts outside this circuit who have already addressed the issue" and holding bankruptcy court had authority to enter summary judgment order because "[u]niversally these courts have all reached the same holding, that is, a Seventh Amendment jury trial right does not mean the bankruptcy court must instantly give up jurisdiction and that the case must be transferred to the district court").

judge, as a statutory matter, to enter final judgment in the proceeding." 131 S. Ct. at 2604 (citing *Granfinanciera*, 492 U.S. at 50). Lower courts generally adopted the same assumption. *See, e.g., In re Arbco Capital Mgmt.*, 479 B.R. at 260 ("[P]rior to *Stern*, it was widely understood that, pursuant to the 1984 Act, the Bankruptcy Court had the authority to finally resolve core matters . . . ."); *Dev. Specialists*, 462 B.R. at 466 ("Before *Stern*, courts . . . were accustomed to resolving whether the Bankruptcy Court could finally adjudicate a given claim by asking whether or not it could be considered 'core' under 28 U.S.C. § 157."). This Court's decision in *Stern* upended the widespread belief that bankruptcy courts had the authority to issue final judgments on core claims pursuant to § 157(b)(1) and (2).

D. Litigants In Pending Cases Should Be Allowed To Argue That Bankruptcy Courts Lacked Authority To Enter A Final Judgment Based On *Stern*

Before this Court's decision in *Stern*, defendants could not have known that they had a right to contest the authority of the bankruptcy court to enter final judgments on certain claims because it was *Stern* itself that provided defendants "with a legal basis to contest the Bankruptcy Court's adjudicative power that they did not have before." *Dev. Specialists*, 462 B.R. at 472 (noting that a "waiver of important rights should only be found where it is fully knowing").[10] As discussed above,

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10. *See In re Madison Bentley*, 474 B.R. at 440 (holding that defendants' conduct did "not warrant the waiver of important rights given the emergence of important new precedent" where

principles of waiver, fairness and common sense dictate that a party in a pending case who, before *Stern*, did not object to the authority of the bankruptcy court to enter a final judgment on a "core" claim—which 28 U.S.C. § 157 clearly provides—should be allowed to contest the bankruptcy court's authority following *Stern* provided it is done within a reasonable time period and without prejudicial delay.

According to the United States as *amicus curiae*, Sharif should have predicted this Court's decision in *Stern* based on *Granfinanciera* and contested the bankruptcy court's constitutional authority. (*See* United States Br. at 30-31.) But, *Granfinanciera* did not put litigants on notice that aspects of § 157(b) were unconstitutional. *See supra* at 17; *see also Teleservices Grp.*, 456 B.R. at 339 n.66 (rejecting argument that defendant should have been aware of the constitutional deficiencies of § 157 based on *Granfinanciera* and *Northern Pipeline*). Courts in the Seventh Circuit, like most courts, assumed the

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defendants filed a motion to withdraw the reference eight months after *Stern*); *Wolf v. Nayna Networks, Inc. (In re Prof'l Satellite & Commc'n, LLC)*, No. 12cv70 L(MDD), 2012 WL 6012829, at *2 (S.D. Cal. Dec. 3, 2012) (finding motion to withdraw reference timely "[g]iven the timing of the *Stern* decision"); *Retired Partners of Coudert Bros. Trust v. Baker McKenzie LLP (In re Coudert Bros. LLP)*, No. 11-2785(CM), 2011 WL 5593147, at *12 (S.D.N.Y. Sept. 23, 2011) ("[U]ntil *Stern* strongly embraced the approach of the *Marathon* plurality, it is doubtful that the [defendant] knew or could have known that it had a right to Article III adjudication that it was waiving."); *Meoli v. Huntington Nat'l Bank (In re Teleservices Grp., Inc.)*, 456 B.R. 318, 339 (Bankr. W.D. Mich. 2011) (stating that, prior to the issuance of *Stern*, defendant did not make a knowing waiver of its right to have an Article III judge enter a final judgment on fraudulent transfer claims).

constitutionality of § 157(b)(2) long after *Granfinanciera*. *See Paloian v. Carl Edward Avallon Trust (In re Pro-Pak Serv.)*, No. 02 C 5528, 2002 U.S. Dist. LEXIS 24926, at *5-7 (N.D. Ill. Dec. 30, 2002) (noting *Granfinanciera* and rejecting motion to withdraw reference for preference and fraudulent conveyance claims because they were defined as core by § 157(b)(2)); *Plan Adm'r v. Lone Star RV Sales, Inc. (In re Conseco Fin. Corp.)*, 324 B.R. 50, 55-56 (N.D. Ill. 2005) (rejecting defendant's motion to withdraw the reference based on defendant's intention to seek a jury trial and noting that the bankruptcy court may resolve dispositive motions which would eliminate the need for a jury trial in the district court). The United States does not point to a single case decided before *Stern* from the Seventh Circuit or any other jurisdiction holding that bankruptcy courts lacked the constitutional authority to finally adjudicate core matters.

Although this Court in *Stern* referenced *Granfinanciera* and other prior decisions, reliance on precedent—an inherent feature of judicial decision-making—hardly means the outcome was so predictable that it should have been anticipated by any prudent litigant. This Court rejected such an approach to waiver in *Curtis Publishing*. The Court there reviewed whether the defendant had waived certain constitutional defenses to libel claims based on the decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which was issued soon after the jury returned a verdict against the defendant in *Curtis Publishing*. *See* 388 U.S. at 138-39. The appellate court held that the defendant waived any right to challenge the verdict based on *Sullivan* because "the general state of the law at the time of [the] trial was such that [appellant] should . . . have seen 'the handwriting on the wall.'" *Id.*

at 143 (citing 351 F.2d 702, 734 (5th Cir. 1965)). This Court disagreed, stating that although *Sullivan* "did draw upon earlier precedents," there was also strong precedent indicating that libel actions were not subject to constitutional challenge.[11] *Id.* at 143-44. The Court held that it was the "eventual resolution of [*Sullivan*], rather than its facts and the arguments presented by counsel, which brought out the constitutional question," and thus the Court, "would not hold [the defendant] waived 'a known right' before it was aware of the [*Sullivan*] decision." *Id.* at 145.

Consistent with this Court's holding in *Curtis Publishing*, litigants should be allowed to assert a *Stern* objection to the bankruptcy court's exercise of authority to finally adjudicate a particular claim, even if they did not assert that objection before *Stern* was decided. Courts should look at a litigant's conduct after *Stern* was decided. *See Dev. Specialists*, 462 B.R. at 469 (stating that the timeliness of a motion to withdraw the reference "should be evaluated by looking to how promptly the [defendants] moved for withdrawal following *Stern*"). If the litigant asserted an objection based on *Stern* within a reasonable time and before availing itself of the bankruptcy court's jurisdiction then the objection should be heard. In contrast, if the litigant waits, participates

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11. The Court stated further that "[g]iven the state of the law prior to our decision in [*Sullivan*], we do not think it unreasonable for a lawyer trying a case of this kind . . . to have looked solely to the defenses provided by state libel law." 388 U.S. at 144. Moreover, the Court rejected the notion that its grant of certiorari in *Sullivan* should have signaled a different conclusion, or that defendants' counsel, who were involved in *Sullivan*, should have been alerted to the constitutional issues. *Id.*

in the bankruptcy court proceedings and then belatedly raises the *Stern* objection to gain a tactical advantage, only then could the *Stern* objection be deemed waived. *See Bank of Neb. v. Rose (In re Rose)*, 483 B.R. 540, 545 (B.A.P. 8th Cir. 2012) (debtor consented to bankruptcy court's final judgment on state law counterclaims where debtor failed to object at trial or in the post-trial brief filed nearly one year after *Stern* was issued and objected only after receiving an adverse judgment).[12] Where a litigant asserts its newly articulated rights within a reasonable period of time, there is no concern about sandbagging and no waiver of a known right should be found.[13]

Under Seventh Circuit precedent controlling at the time, Sharif did not have a valid constitutional objection to the bankruptcy court's adjudication of the claims against

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12. *See also Gibson v. Tucker (In re G&S Livestock Co.)*, 478 B.R. 906, 917-18 (S.D. Ind. 2012) (defendants consented to bankruptcy court adjudication of fraudulent transfer claims where they stipulated to the court's authority under § 157 in their post-trial brief filed four months after *Stern* was issued and objected to the court's authority only after receiving an adverse judgment); *Dev. Specialists*, 462 B.R. at 472 (distinguishing litigants that move to withdraw the reference after an adverse ruling from defendants who moved to withdraw shortly after the *Stern* decision was issued, making "sandbagging" concerns "considerably less acute").

13. *Stern* discusses "sandbagging" in response to the statutory argument that the bankruptcy court lacked jurisdiction to enter final judgment on a defamation claim against the bankruptcy estate under § 157(b)(5), which provides for trial of certain claims in the district court. 131 S. Ct. at 2607-08. The *Stern* Court's comments about sandbagging did not relate to the argument that the bankruptcy court lacked constitutional authority to enter final judgment on the bankruptcy estate's counterclaim. *Id.*

him. *Stern* gave Sharif the objection and Sharif thereafter asserted it. Sharif did not waive the objection by failing to assert it when it did not yet exist.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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November 26, 2014

APPENDIX

Appendix

APPENDIX — LIST OF *AMICI CURIAE*

The *amici curiae* consist of the following entities:

- Atascosa Investments, LLC;
- Aurum CLO 2002-1 Ltd.;
- Bank of America, N.A.;
- Burnet Partners, LLC;
- Deutsche Bank Trust Company Americas;
- Flagship CLO III;
- Flagship CLO IV;
- Flagship CLO V;
- Gleneagles CLO Ltd.;
- Goldman Sachs Credit Partners, L.P.;
- Grand Central Asset Trust, HLD Series;
- Grand Central Asset Trust, SOH Series;
- Hartford Mutual Funds, Inc., on behalf of The Hartford Floating Rate Fund by Hartford Investment Management Company, their Sub-Advisor;

Appendix

- Highland CDO Opportunity Fund, Ltd.;
- Highland Credit Opportunities CDO Ltd.;
- Highland Floating Rate Advantage Fund;
- Highland Floating Rate LLC;
- Highland Legacy Limited;
- Highland Loan Funding VII, LLC;
- Highland Offshore Partners, L.P.;
- Jasper CLO, Ltd.;
- LL Blue Marlin Funding LLC;
- Liberty CLO, Ltd.;
- Merrill Lynch Credit Products LLC;
- Ocean Bank;
- Rockwall CDO, Ltd.;
- Silver Oak Capital LLC;
- Stedman CBNA Loan Funding LLC;
- The Foothills Group, Inc.;

Appendix

- Van Kampen Dynamic Credit Opportunities Fund;
- Van Kampen Senior Income Trust;
- Van Kampen Senior Loan Fund; and
- Wells Fargo Bank, N.A.

AMICUS CURIAE BRIEF

No. 13-935

In The Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LIMITED, et al.,

Petitioners,

v.

RICHARD SHARIF,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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U.S. Department of Justice, Executive Office for United States Trustees, Handbook for Chapter 7 Trustees (Effective October 1, 2012) 3

STATEMENT OF INTEREST OF NABT AS AMICUS CURIAE

The National Association of Bankruptcy Trustees ("NABT") is a non-profit association formed in 1982 to address the needs of Chapter 7 bankruptcy trustees throughout the country, and to promote the effectiveness of the bankruptcy system as a whole.[1] There are more than 1,000 bankruptcy trustees currently receiving new cases, and approximately 850 trustees are NABT members. As a result, NABT is intimately familiar with the application of the Bankruptcy Code in the practical context of bankruptcy cases.

Chapter 7 trustees are appointed and supervised by the Office of the United States Trustee to administer bankruptcy cases under Chapter 7 of the U.S. Bankruptcy Code (the "Code"). In this capacity, Chapter 7 trustees are duty-bound to investigate the extent of property that should be included in a debtor's bankruptcy estate, and to recover and liquidate that property for the benefit of the estate's creditors.[2]

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[1] All parties have consented to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than NABT, or its counsel, made a monetary contribution intended to fund its preparation or submission.

[2] "Property of the estate" consists generally of the debtor's interests in property owned as of the day of the filing of his bankruptcy petition (11 U.S.C. § 541(a)) and certain limited property acquired post-petition (*e.g.*, property inherited within 180 days after the bankruptcy filing, § 541(a)(5)). "Property of

(Continued on following page)

Chapter 7 trustees are charged with the responsibility of administering assets and cases quickly and efficiently, and their ability to do that in the hundreds of thousands of new Chapter 7 bankruptcy cases filed each year will be seriously undermined if the decision below of the United States Court of Appeals for the Seventh Circuit is affirmed. NABT thus respectfully urges this Court to reverse the decision below, inasmuch as it will have a significant adverse impact on the ability of Chapter 7 trustees to effectively perform their critical role in our bankruptcy system.

STATEMENT OF THE CASE

NABT agrees with and adopts as its own Petitioner's statement of the case. However, in order to make the facts of this case clear in a broader context, NABT will (i) summarize the role played by Chapter 7 trustees in liquidation cases generally, (ii) provide a limited discussion of the facts of this appeal and how the adversary proceeding that gave rise to it does not

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the debtor" generally refers to property in which the debtor has an interest, and could exist before the bankruptcy estate is created (*e.g.*, 11 U.S.C. § 547 (authorizing trustee to recover for the estate property of the debtor transferred to non-insider creditors 90 days pre-petition)). Trustees routinely seek to recover pre-petition property of the debtor in order to bring it into the debtor's bankruptcy estate (such as property inappropriately transferred or concealed pre-petition), which the trustee then administers for the benefit of the debtor's creditors (*see, e.g.*, 11 U.S.C. §§ 542, 550).

involve the Chapter 7 trustee, and (iii) provide additional information regarding proceedings presently underway in Respondent's bankruptcy case that are outside the scope of this appeal, but which do involve the Chapter 7 trustee and which are relevant to provide context for the case before the Court.

A. The Duties and Role of Chapter 7 Trustees

The Code provides for the appointment of a trustee in Chapter 7 cases to administer estate property. 11 U.S.C. §§ 701, 704. Chapter 7 trustees have a broad array of statutory and other duties intended to promote the efficient administration of bankruptcy cases, and to preserve the integrity of the bankruptcy system. *See generally*, 6 ALAN N. RESNICK AND HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 704.01 (16th ed. 2013) (hereinafter "COLLIER ON BANKRUPTCY"); *see also* U.S. Department of Justice, Executive Office for United States Trustees, Handbook for Chapter 7 Trustees (Effective October 1, 2012) (the "TRUSTEE HANDBOOK"), available at http://www.justice.gov/ust/eo/private_trustee/library/chapter07/ (last visited September 14, 2014) at p. 1-2 ("[T]he trustee's primary statutory duties are set forth in part in section 704 of the Bankruptcy Code. . . ."). Chapter 7 trustees are charged with investigating the financial affairs of the debtor and the nature and extent of property of the bankruptcy estate. 11 U.S.C. § 704(a)(4); TRUSTEE HANDBOOK, pp. 4-3 – 4-4 (noting obligation of Chapter 7 trustee to inventory debtor's property).

Chapter 7 trustees must also assemble and reduce to cash all property of the estate, and then distribute that cash to creditors. 11 U.S.C. § 704(a)(1); 4 COLLIER ON BANKRUPTCY ¶ 521.15[1] (noting trustee's duties in context of debtor's duty to cooperate); 6 COLLIER ON BANKRUPTCY ¶ 704.02. In order to implement this obligation, trustees are given the right to demand the turnover of the debtor's property, and debtors and third parties are obligated to cooperate. 11 U.S.C. § 521(a)(3), 542.

Finally, Chapter 7 trustees are required to close the estate "as expeditiously as is compatible with the best interests of parties in interest." 11 U.S.C. § 704(a)(1), (4). In undertaking this duty, and some of those noted above, trustees often seek orders compelling debtors or third parties to turn over to the trustee estate property. *See* 6 COLLIER ON BANKRUPTCY ¶ 704.02[3].

B. This Appeal Does Not Involve an Action for the Turnover of Estate Assets to Augment the Bankruptcy Estate

The underlying adversary proceeding in this case did not involve a Chapter 7 trustee. The litigation was between a creditor – Petitioners – and a debtor – Respondent.

The gravamen of Petitioners' complaint (the "complaint") in the adversary proceeding below was a

denial of Respondent's discharge, JA pp. 5-21,[3] as is evident from the complaint's preamble (which identifies 11 U.S.C. § 727 as the statutory basis for the requested relief). *Id.* The complaint also included a separate count seeking a declaratory judgment that a certain trust (the Soad Wattar Trust) in which the debtor had an interest was the "alter ego" of the debtor. *Id.* at pp. 19-21. This "alter ego" count has been described, in substance, as an "11 U.S.C. § 541 action" brought against a debtor. *See* PB p. 12 (discussing "Wellness's § 541 action"). The complaint doesn't mention 11 U.S.C. § 541. Neither the district court nor bankruptcy court decisions below relied on 11 U.S.C. § 541 as a source of authority for relief sought or granted.

Reference to the statutory framework reveals why. The statute, 11 U.S.C. § 541, defines what constitutes a debtor's estate in bankruptcy. PA pp. 6a-16a. It does nothing more than provide a definition. *Id.* The statute, by its terms, does not create a cause of action. It simply identifies what is, and is not, property of the estate. *See id.* It is likely that it is for this reason that the "alter ego" count below sought nothing more than a declaratory judgment.

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[3] References to "JA" are citations to the Joint Appendix. References to "PA" are citations to the statutory appendix included with Petitioners' merits brief. References to "PB" are citations to Petitioners' Brief on the merits. References to "Resp. Pet. Opp." are to Respondent's opposition to Petitioners' petition for a writ of certiorari.

Describing the alter ego count in the adversary proceeding below as a "§ 541 action" can lead to unnecessary confusion. NABT makes this point to avoid such a result, in that it is possible to mistakenly infer that something called an "action" pursuant to a statute entitled "Property of the estate" is an action for the return or recovery of property. That was not the nature of the proceeding below, as Petitioners make clear in their merits brief. PB p. 26 ("A § 541 action [ ] does not seek monetary damages; it seeks a declaration of title consistent with a bankruptcy court's traditional *in rem* jurisdiction."). This appeal simply does not involve a cause of action seeking a recovery of property to augment the bankruptcy estate.

C. Turnover is the Mechanism to be Used – and Which *is* Being Used, in a Different Proceeding – to Augment the Estate and Recover Estate Property

The proper mechanism for seeking a recovery of estate property in order to augment the estate is 11 U.S.C. § 542, entitled "Turnover of property to the estate". This appeal has nothing to do with an action to recover property of the estate for the benefit of creditors under Code § 542. That is not to say that such an action is not proper – it is just that this appeal has nothing to do with it.

Consistent with the duties of Chapter 7 trustees detailed above, separate and apart from Petitioners'

objection to discharge action, the Chapter 7 trustee in Respondent's bankruptcy case sought turnover of the assets in the Soad Wattar Trust. *See* Resp. Pet. Opp. p. 8. That litigation proceeded on a different track than the objection to discharge action at issue here, and remains subject to its own pending appeal. Respondent, and Respondent's sister, Ragda Sharifeh (who claims to be the trust beneficiary), are both involved in that proceeding. *Id.* Any order or judgment requiring the turnover of assets to augment the estate will be entered and addressed on appeal in that proceeding, not this one.

SUMMARY OF ARGUMENT

This appeal addresses issues regarding the extent to which bankruptcy courts can enter final orders in matters that are central to the bankruptcy process. The bankruptcy court below entered a final judgment against Respondent, and the bankruptcy court's ruling was upheld on appeal by the district court. The Seventh Circuit affirmed in part and reversed in part. This Court then granted Petitioners' petition for a writ of certiorari, limited to two questions.

The first question addresses whether "the presence of a subsidiary state property law issue in an 11 U.S.C. § 541 action brought against a debtor" takes such an "action" outside the scope of matters that "stem from the bankruptcy itself" and which

therefore cannot be resolved by a final judgment of an Article I bankruptcy court under the test articulated by this Court in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). NABT respectfully submits that the presence of state law issues in proceedings to determine whether property belongs to a debtor's bankruptcy estate should have no impact on the question of whether those proceedings "stem from the bankruptcy itself." Furthermore, such proceedings are properly characterized as "core" matters for which bankruptcy courts can enter final judgments consistent not only with the statutory text, but also with constitutional limitations. NABT agrees with, and adopts as its own, the constitutional analysis on this point set out by Petitioners in their merits brief.

Alternatively, this appeal can be determined on a narrower basis, because of the essential nature of the underlying adversary proceeding – *i.e.*, a complaint brought by a creditor to determine whether a debtor's discharge should be denied under 11 U.S.C. § 727(a). Section 727 lists twelve grounds upon which a debtor can be denied a discharge, and the creditor in the adversary proceeding below invoked four of such grounds, each of which in some way required a determination of the debtor's property or assets that existed but were improperly concealed or transferred before or after the filing of the bankruptcy.[4] Objections

[4] Section 727 is reproduced in its entirety in the statutory appendix hereto. The creditor's adversary complaint relied on Sections 727(a)(2)(A) (concealment or transfer of the debtor's property within a year before the bankruptcy), 727(a)(3)

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to discharge are indelibly "core" bankruptcy matters that "stem from the bankruptcy itself," and thus can be resolved by entry of final judgments by bankruptcy courts. Where, as here, the bankruptcy court must determine the "debtor's property" or "property of the estate"[5] in order to adjudicate one of the grounds for objection to a debtor's discharge, *a fortiori* such a property determination is likewise a "core" bankruptcy matter that "stem[s] from the bankruptcy itself" for which the bankruptcy court maintains the statutory and constitutional authority to enter a final judgment. The "alter ego" count of the underlying complaint required the same determination of the debtor's property as the counts of the complaint seeking denial of discharge, and by denying the bankruptcy court constitutional authority to make that property determination in that alter ego count, the Seventh Circuit necessarily undermined the bankruptcy court's undisputed constitutional authority to decide the counts related to the discharge objections. Accordingly, the Seventh Circuit decision below may also be reversed on this alternative ground.

The second question addresses whether, if the answer to the first question is "Yes" and the bankruptcy

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(concealment of records related to the debtor's property), 727(a)(4)(A) (false oath by the debtor) and 727(a)(5) (debtor's failure to satisfactorily explain a loss of the debtor's assets). *Wellness Int'l Network, et al. v. Sharif*, 727 F.3d 751, 757 (7th Cir. 2013).

[5] *See* note 2, *supra*.

court could not have entered a final judgment consistent with constitutional limitations, Respondent could nonetheless consent to the entry of such a final judgment, and whether implied consent "is sufficient to satisfy Article III" of the Constitution. Although resolution of the first question as set out above is determinative of this appeal, NABT respectfully submits that either express or implied litigant consent is sufficient to permit the resolution of "non-core" matters by Article I bankruptcy courts by entry of final orders and judgments, and overcome any Article III concerns. Here, too, NABT agrees with and adopts as its own the constitutional analysis set out by Petitioners in their merits brief. Furthermore, NABT details the manner in which a rule to the contrary will have a substantial negative impact upon the administration of bankruptcy cases.

ARGUMENT

I. The Objection to Discharge Adversary Proceeding Below Is a "Core" Matter in Which the Bankruptcy Court Could Enter Final Orders and Judgments

The complaint below makes clear that the gravamen of the relief sought by Petitioner was entry of a final judgment denying a discharge to Respondent. JA pp. 5-21. Objections to discharge are matters that "stem from the bankruptcy itself" under *Stern* because a judgment providing for such relief is a "core" matter that "arises under" the Code and "arises in" a

bankruptcy case. Any state law determinations that have to be made in rendering a judgment on an objection to discharge do not change the "core" status of the proceeding, and do not make it constitutionally impermissible for an Article I bankruptcy court to enter a final judgment in those matters.

A. The Objection to Discharge Action Is a "Core" Matter "Arising Under" the Code and Which "Arises In" a Bankruptcy Case

28 U.S.C. § 157(b)(1) provides that bankruptcy courts may enter final orders and judgments in "core" proceedings "arising under title 11, or arising in a case under title 11[.]" Objections to discharge pursuant to 11 U.S.C. § 727 are matters "arising under title 11" in that the statute, in and of itself, is what creates the right to relief. *See* 1 COLLIER ON BANKRUPTCY ¶ 3.01[3][e][i]; *see also* 28 U.S.C. § 157(b)(2)(J). Moreover, an objection to a discharge in bankruptcy is a matter that is unique to bankruptcy law, and which "aris[es] in a case under title 11". *See* 1 COLLIER ON BANKRUPTCY ¶ 3.01[3][e][iv]. Accordingly, the causes of action alleged in the adversary proceeding complaint asserting objections to discharge are "core" matters for which the bankruptcy court could enter a final order consistent with the constitutional standard articulated by this Court in *Stern*.

The court of appeals correctly determined this issue and affirmed the bankruptcy court's rulings under Code § 727. *See Wellness*, 727 F.3d at 762 ("The

first four counts of [Petitioners'] adversary complaint clearly are core matters, and [Respondent] does not argue otherwise."); *see also id.* at 773. As discussed below, however, the appeals court engaged in a flawed analysis of the relationship between the alter ego claim and the discharge claims, thus creating confusion that NABT asks this Court to correct.

B. Necessarily Implied in the Relevant Parts of Code § 727 Is Authority to Determine Property of the Debtor or the Estate

Although the Code § 727 analysis of the court of appeals was correct, the court's analysis was erroneous in its assessment of whether the bankruptcy court could determine the "alter ego" claim by entry of a final judgment.

The grounds under Code § 727 upon which the creditor below (Petitioner) sought to deny the Respondent debtor a discharge included Code § 727(a)(2)(A) which provides, in pertinent part, that a debtor shall be provided a discharge unless "the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed ... property of the debtor, within one year before the date of the filing of the petition[.]" 11 U.S.C. § 727(a)(2)(A).[6] Thus, resolution of the objection to

[6] 11 U.S.C. § 727(a)(2)(B) speaks to property of the estate.

discharge (a matter that "stems from the bankruptcy itself") required that the bankruptcy court first determine whether the property at issue was property of Respondent within the year prior to bankruptcy – property that could ultimately be brought into the bankruptcy estate by the trustee.

Specifically, Petitioner was concerned that the Respondent had an interest in property of a trust that the Respondent initially had failed to disclose to the Chapter 7 trustee and which should be brought into the estate, and further sought a declaratory judgment that the trust was an alter ego of the debtor. Insofar as all of the discharge objections on their face required a determination of whether the property in the trust was property of the estate, the bankruptcy court could not adjudicate the clearly "core" discharge objections without determining whether the property in the trust was property of the debtor that existed on the date of the filing and hence was property of the estate. By denying the bankruptcy court constitutional authority to decide the alter ego count (727 F.3d at 775-776), which dealt with the identical issue of whether the trust contained the debtor's property, the court of appeals necessarily undermined the essential and undisputed constitutional authority of the bankruptcy court to decide the discharge counts of the complaint.

Viewing the declaratory judgment count in the complaint below as something that was separate and distinct from the objection to discharge counts, the court of appeals undertook a flawed analysis. In

attempting to analogize this case to the narrow holding of this Court in *Stern*, the court of appeals improperly focused on (i) the fact that "nothing indicate[d] that [the alter ego claim] ha[d] any relation to the claims-allowance process" and (ii) the fact that alter ego claims were matters of state law. *Wellness*, 727 F.3d at 774-76. This was the wrong focus. Although the claims allowance process was at issue in *Stern*, here, it was not.

Using the claims-allowance-based element-by-element analysis from this Court's decision in *Stern* as a benchmark, the court of appeals assessed whether the elements of an objection to discharge overlapped with Illinois state law alter ego theory. This was error. An element-by-element analysis made sense in *Stern* because the Court was considering whether a counterclaim filed in response to a proof of claim could properly be considered a "core" matter. The counterclaim's relationship to the underlying creditor proof of claim was at issue – whether it was sufficiently related to that proof of claim to permit the counterclaim to be determined as a "core" matter. Here, there is no need to question the relationship between two competing claims because there are no competing claims. Instead, the matter is completely circumscribed within the scope of a single statute – Code § 727.

The court of appeals failed to fully appreciate that "core" matters not only include matters that "necessarily would be resolved in the claims allowance process," *see Stern*, 131 S. Ct. at 2618, but *also* include matters that "stem from the bankruptcy itself," *see id*;

see also 28 U.S.C. § 157(b)(1) (addressing matters that "arise under" the Code and "arise in" a case under the Code). The court of appeals rigidly applied the claims-allowance analysis of *Stern* where it should not have. Objections to discharge are undeniably matters that "stem from the bankruptcy itself." Such actions are uniquely creatures of bankruptcy law, that exist only in the context of a bankruptcy proceeding, and rely upon Code § 727. In the context presented here, a determination that property of the debtor was at issue was a necessary component for determining whether to deny a discharge.[7] There was no need to undertake an "overlap" analysis because competing claims were not at issue and because a property of the debtor determination was a required *element* under the applicable subsections of Code § 727(a).[8]

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[7] NABT respectfully submits that the inclusion of a separate "alter ego" count in the complaint below was unnecessary and cumulative. Even without such a count, a determination on Count I, relating to property of the estate, would have included a determination and finding of fact that property of the estate was at issue. Such a finding would be binding on Respondent, as a party to that litigation, in subsequent proceedings.

[8] The court of appeals was concerned that the Soad Wattar Trust was not a party to the adversary proceeding below, but there was no reason for the trust to be a party to that litigation. There is a significant distinction between an action pursuant to 11 U.S.C. § 542 for turnover of estate property (not at issue in this case) and an action pursuant to 11 U.S.C. § 727, seeking denial of discharge. If a determination is made in a discharge action that certain property falls within the scope of Code § 541, "turnover" or return of that property is not required. An action

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C. Determinations Regarding Property of the Debtor or the Estate are Required for Rulings Involving Many Critical Functions of the Bankruptcy Courts and Code

As detailed *supra*, Code § 727(a)(2)(A) requires a finding that a debtor concealed his property as a ground for a discharge to be denied. The only reasonable inference to be drawn from the statutory text is that bankruptcy courts have authority to determine whether property of the debtor exists and is, in fact, property of the estate, as part of a § 727 analysis, even if state law is implicated in making that determination.

Construing the statute otherwise would have profound effects on the administration of all bankruptcy cases – under all chapters – well beyond the narrow context of this case. For example, in actions for turnover of estate property brought pursuant to Code § 542, implied within the power to order turnover is the power to determine that the property at issue is, in fact, property of the estate. *See* 11 U.S.C. § 542. Likewise, in motions seeking authority to sell property of the estate pursuant to Code § 363, implied within the power to permit a sale of estate property is the power to determine that the property is, in fact, property of the estate. *See* 11 U.S.C. § 363.

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for turnover, pursuant to Code § 542, is required in order to obtain that relief. As is noted *supra*, a turnover proceeding has been brought by the Chapter 7 trustee in Respondent's underlying bankruptcy case and is currently pending. The trust is a party to that litigation.

Similar examples, involving underlying questions of state law about "what is property of the estate" or "what is property of the debtor" that may be recovered for the estate, each of which must be resolved in ruling on whether various forms of relief is proper, can be found throughout the Code:[9]

- The scope of the automatic stay, which protects property of the estate. 11 U.S.C. §§ 362, 922.
- Whether to approve financing, which permits the grant of liens on property of the estate. 11 U.S.C. §§ 364, 901(a).
- Whether to permit the use of property of the estate, or the lease of property of the estate. 11 U.S.C. § 363.
- The allowance and disallowance of claims. 11 U.S.C. §§ 502(b)(1), 901(a).
- Claims of exemptions. 11 U.S.C. § 522.
- As is noted above, turnover actions. 11 U.S.C. § 542.
- Assertion of avoidance power. 11 U.S.C. §§ 544(a), 545, 901(a).
- Actions for the recovery of preferences and fraudulent conveyances, which encompass recovery of "transfers" of the

[9] Although Chapter 7 trustees are not involved in cases under Chapter 9 of the Code, NABT notes that property of the estate issues are also present in Chapter 9 municipality cases.

debtor's property pre-petition for the benefit of the estate (which may be in the form of cash or other property, either of which have to be property of the debtor recoverable by the estate). 11 U.S.C. §§ 544, 547, 548, 550, 901(a).

- Abandonment of estate property. 11 U.S.C. § 554.

With determinations of "what is property of the estate" and "what is property of the debtor" being so pervasive throughout the Code, the most reasonable inference to be drawn from the statutory text is that Congress intended for such determinations to be made by bankruptcy courts, by entry of final orders, when necessary for a ruling in "core" matters. Indeed, if bankruptcy courts are not able to make final determinations of matters that are implied by statutory grants of authority in "core" matters – such as the finding of whether estate property was concealed in an objection to discharge – the bankruptcy system as we know it will be substantially dismantled. Cases in which NABT members are obligated to administer bankruptcy estates efficiently will become vulnerable to crippling inefficiency.

Consider what would happen to the administration of any Chapter 7 case where there was an asset that could be pursued for recovery by a trustee, but the bankruptcy court is unable to determine whether the property at issue is property of the estate. Every such case will have to be sent to a district court, or perhaps a state court, to make that basic determination before

any relief can be granted by the bankruptcy court. The procedural gymnastics that will be required can only be imagined:

- For any of the matters detailed above, and others, relief must first be sought in the bankruptcy court.
- The bankruptcy court will have to determine whether an underlying state law issue exists that precludes it from entering a final judgment.
- The parties will have to make a motion to withdraw the reference, or remand.
- A matter will have to be opened in the "new" state or district court.
- The relevant case file or documents will have to be transferred from the bankruptcy court to the "new" court.
- The parties will litigate in the "new" court, subject to the time constraints and practical limitations of the calendars of courts of general jurisdiction (such as the right to a speedy trial in federal district court).
- A final judgment would need to be entered in the "new" court with respect to the underlying state law issue.
- Finally, the matter must be returned to the bankruptcy court for ruling on the overriding bankruptcy action under the Code.

The impact that the tortured and inefficient scenario detailed above will have on Chapter 7 cases is evident: the cost, expense, and delay imposed by this awkward process will cause cases to fail, deplete estate assets, and give rise to gamesmanship and abuse. Moreover, many Chapter 7 bankruptcy estates already have little or no cash that can be used by Chapter 7 trustees to pursue claims against third parties for the benefit of creditors, and Chapter 7 tructees frequently incur substantial non-payment or delayed payment risk in order to enable creditors to have any distribution at all. The incremental procedural gymnastics outlined above will only make matters worse, substantially weakening both the trustee's ability to pursue claims and her leverage against potential defendants all too eager to exploit procedural delays to defeat those clams – thus further jeopardizing potential creditor recoveries. This simply cannot be what Congress envisioned in enacting the Code, or this Court envisioned in articulating the constitutional standard to be applied after *Stern*. *See Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938) (" . . . to construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where, as here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law.") (footnote and citations omitted). Nor can such a tortured reading of the statute be sustained in contradiction to a reading of the Code that permits bankruptcy courts to determine state

law matters necessarily included within the scope of determinations permitted in "core" matters that arise out of a federal statute.

* * *

For the reasons set forth herein, NABT respectfully submits that the presence of an underlying state law issue that must be resolved in order to grant relief pursuant to a specific statutory grant provided by the Code does not impact the "core" status of that matter and certainly does not render such matters "non-core." Bankruptcy courts must therefore be permitted to enter final orders and judgments in such matters.

II. Consent

NABT agrees with and adopts as its own the "consent" analysis and argument presented in Petitioners' merits brief. NABT notes that if consent is found not to be sufficient to overcome a constitutional deficiency grounded in the Article I status of bankruptcy courts, it will have a substantial negative impact upon the administration of Chapter 7 bankruptcy cases – including those administered by NABT's members. The inefficiencies in litigating bankruptcy matters outside of bankruptcy courts place a particularly heavy burden upon Chapter 7 trustees handling cases where efficiency in administering estate assets is a priority.

CONCLUSION

NABT, as amicus curiae in support of Petitioners, respectfully requests that the Court reverse the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Statutory Appendix

727. Discharge

(a) The court shall grant the debtor a discharge, unless –

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed –

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case –

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a

promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case –

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within 8 years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least –

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort;

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter;

(11) after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111, except that this paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses under this section (The United States trustee (or the bankruptcy

administrator, if any) who makes a determination described in this paragraph shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter.); or

(12) the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is reasonable cause to believe that –

(A) section 522(q)(1) may be applicable to the debtor; and

(B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if –

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee;

(3) the debtor committed an act specified in subsection (a)(6) of this section; or

(4) the debtor has failed to explain satisfactorily –

(A) a material misstatement in an audit referred to in section 586(f) of title 28; or

(B) a failure to make available for inspection all necessary accounts, papers, documents, financial records, files, and all other papers, things, or property belonging to the debtor that are requested for an audit referred to in section 586(f) of title 28.

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge –

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of –

(A) one year after the granting of such discharge; and

(B) the date the case is closed.